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In District Court of the United States for the District of Columbia

Criminal No. 246-47

UNITED STATES OF AMERICA

v.

BAXTER GRIFFIN.

Notice of Appeal

Filed June 2, 1948

(Name and address of appellant) Baxter Griffin, District Jail, District of Columbia

(Name and address of appellant's attorney) Hans Nathan, Portland Bldg., Wash., D. C.; John M. Holzworth, 62 King St., Alexandria, Va.

Offense Murder—1st degree

Date of judgment May 25, 1948

Brief description of judgment or sentence Order denying motion for new trial on the grounds of newly discovered evidence.

Name of prison where now confined, not on bail District Jail.

I, the above-named appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

BAXTER GRIFFIN
Appellant.

HANS NATHAN
JOHN M. HOLZWORTH
Attorneys for Appellant.

Date June 2 1948.

"B" In District Court of the United States for the District of Columbia

Clerk's Statement of Docket Entries to be Forwarded Under Rule IV

1. Indictment for First Degree Murder filed March 3, 1947
2. Arraignment March 7, 1947
3. Plea to indictment Plea Not Guilty March 7, 1947
4. Motion to withdraw plea of guilty denied 19
5. Trial by jury, March 27, 1947
6. Verdict or finding of guilt Guilty as indicted March 28, 1947
7. Judgment—(with terms of sentence) Sentenced to death by electrocution (Holtzoff, J.) entered April 18, 1947
8. Order denying motion for new trial on grounds of newly discovered evidence June 2, 1948
   Notice of Appeal filed June 2, 1948

Date June 3, 1948.

Attest HARRY M. HULL.
Clerk.

(Seal)

By HELEN M. McINTOSH
Deputy Clerk

N. B.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal; which is to be prepared and certified as provided in rules V, I, VIII, and IX.

"C" In the District Court of the United States for the District of Columbia

Order.

Filed June 2, 1948

On the annexed affidavit of Baxter Griffin verified June 2, 1948, it is hereby ordered and directed that the said Baxter Griffin and his attorneys, Hans Nathan and John M. Holzworth, be furnished with a stenographic transcript of the hearings on the motion for a new trial on the ground of newly discovered evidence for use in an appeal from the order denying said motion to the Court of Appeals at the expense of the government.

/s/ ALEXANDER HOLTZOFF
Justice

Dated June 2, 1948

1 In the District Court of the United States

For the District of Columbia

Criminal No. 24647

UNITED STATES

v.

BAXTER GRIFFIN

Reporter's Transcript of Trial Proceedings.

Filed May 8, 1947.

Washington, D. C., Thursday, March 27, 1947.

This case came on for trial at 11 o'clock a.m., before Hon. ALEXANDER HOLTZOFF, Associate Justice, and a jury.

Appearances:

For the United States:

Mrs. Grace B. Stiles, Assistant United States Attorney.

For the defendant:

Mr. Robert I. Miller, 426 5th Street, N. W., Washington, D. C.

2-3 *Proceedings*

The Clerk: United States versus Baxter Griffin.

The Court. Is the Government ready?

Mrs. Stiles. The Government is ready, Your Honor.

The Court. Are both sides ready?

Mr. Miller. Yes, I am ready.

The Court. Mrs. Stiles, will you identify the case, and address the entire jury panel. Then the Court will interrogate the jury.

Mrs. Stiles. May it please the Court, ladies and gentlemen of the panel, the case we are about to try is one in which the defendant, Baxter Griffin, is indicted for the first-degree murder of one Lee Hunter. This is alleged to have occurred in the District of Columbia on February 8, 1947. The defendant is seated at the counsel table. He is represented by Mr. Robert I. Miller. I am Mrs. Stiles, Assistant United States Attorney, and will present the case for the Government.

In support of the indictment the Government has subpoenaed the following witnesses, who will please stand as their names are called:

Leo J. Hunter;

Bernie James;

Charles Cornwell;

Lurline Bost;

Fannie Pickett;
Esther M. Taylor;
Daisy McCullough;

Dr. H. L. Isbell, of the Emergency Hospital. He is not here at the present time.

Dr. Richard M. Rosenberg, Deputy Coroner of the District of Columbia. He is not here at this time.

Officer Howard L. Pilling;
Officer Luther Miller;
Officer Larry V. Denny;
Sergeant Walter B. Vogelson;
Sergeant Albert L. Embrey.

The Court. My questions will be addressed to all of the jurors present in the courtroom. This case involves a charge of murder in the first degree. The law prescribes the penalty of death in case of conviction in such a case. Is there any juror who has any conscientious scruples against the infliction of capital punishment? If so, please stand up, so that your names may be noted. (Thirteen jurors stood.)

The Clerk will note the names.

(The names of the standing jurors were noted as follows:)

(Thomas R. Jones, Wilson A. Knight, Sidney H. Snapp, Edgar L. Robinson, Patrick McKivigan, Felizita Romagna, Exum E. Roberts, Mrs. Lena Dyson, Henry Martin, Frederick Harlow, Lora D. Adams, Elizabeth Archino, and L. W. Scott.)

5 The Clerk. Sidney Snapp, Edgar L. Robinson, Henry Martin, Frederick Harlow, Lora Adams, Elizabeth Archino, and L. W. Scott—those jurors are excused and are instructed to report back to their regular courtrooms.

(The excused jurors having left the court room:)

The Court. I shall proceed with my questions to all of the jurors in the room:

The defendant in this case is Baxter Griffin, who is seated at the end of the table facing the bench. Do any of you know him? Will you please raise your hands, if you do. (No response.)

Did any of you know Lee Hunter, the deceased, in his lifetime? If so, please raise your hands. (No response.)

Do any of you know any of the witnesses whose names were announced a few moments ago? If so, please raise your hands. (No response.)

In this case the Government is represented by Mrs. Grace Stiles, an Assistant United States Attorney, who addressed you a few moments ago. Are any of you acquainted with Mrs. Stiles? (No response.)

Counsel for the defendant in this case is Mr. Robert L. Miller. Are any of you acquainted with Mr. Miller? He is seated at the counsel table in front of the bench. (No response.)

Do any of you know anything about the case or have any
6 of you heard about this case before? (No response.)

Do any of you know of any reason why you cannot fairly and impartially try the issues of this case solely on the evidence? (No response.)

I assume that your silence implies a negative answer on the part of each of you to each of my questions.

Does either counsel wish the Court to propound any further questions to the jurors?

Mrs. Stiles. The Government has none.

Mr. Miller. I haven't any suggestions.

The Court. Very well. Call the jurors.

The Clerk. Thomas P. Kenefick.

Juror Kenefick. Here.

The Deputy Marshal. No. 1.

The Clerk. Mrs. Lane.

Juror Lane. Here.

The Deputy Marshal. Two.

The Clerk. Abraham Levy.

Juror Levy. Here.

The Deputy Marshal. Three.

The Clerk. Irene Madigan.

Juror Madigan. Here.

The Deputy Marshal. Four.

The Clerk. Alice Martell.

Juror Martell. Here.

7 The Deputy Marshal. Five.

The Clerk. Alec Oisboid.

Juror Oisboid. Here.

The Deputy Marshal. Six.

The Clerk. Ada Phillips.

Juror Phillips. Here.

The Deputy Marshal. Seven.

The Clerk. Beatrice Stinson.

Juror Stinson. Here.

The Deputy Marshal. Eight.

The Clerk. Alice Bradford.

Juror Bradford. Here.

The Deputy Marshal. Nine.

The Clerk. Alma Crawford.

Juror Crawford. Here.

The Deputy Marshal. Ten.

The Clerk. Francis Davidson.

Juror Davidson. Here.
The Deputy Marshal. Eleven.
The Clerk. Anne Fornili.
Juror Fornili. Here.
The Deputy Marshal. Twelve.

Mr. Miller. Your Honor, I did overlook just one question. I notice in looking over the lists that the majority of the jurors are Government employees. I know that would not affect them,
8 but would you ask them, in view of their employment with the United States Government, and the fact that the defendant is charged by the Government? I know it wouldn't, but I would like to get it in the record, Your Honor.

The Court. I want to ask this question of the 12 jurors in the box, as well as of all the other jurors in the courtroom: A good many of you are employed by the United States Government. Would that fact, coupled with the fact that this is a prosecution brought by the United States of America, in any way affect you or influence or sway your judgment? (No response.)

I assume your answer is in the negative.

Mr. Miller. The defendant is satisfied with the jury.

Mrs. Stiles. The Government is satisfied.

The Court. Swear the jury.

(The following jury was accordingly duly sworn by the Clerk to try the case:

(1. Thomas P. Kenefick
(2. Mrs. Ione Odell Lane
(3. Abraham Levy
(4. Miss Irene Madigan
(5. Mrs. Alice Martell
6. Alec Oisboid
7. Mrs. Ada B. Phillips
8. Miss Beatrice Stinson
9. Mrs. Alice Bradford
10. Miss Alma Crawford
11. Francis A. Davidson
12. Mrs. Anne Fornili)

The Clerk. All witnesses in the case of United States versus Baxter Griffin, witnesses who will testify on either side,
9 whether it be on behalf of the defendant or on behalf of the Government, please step forward and follow the Marshal into the witness room—all witnesses.

All the jurors here present from Criminal Courts No. 1 and 2 are excused to return to their own courtroom.

Stipulations as to Certain Facts.

Mr. Miller. May it please Your Honor, it is stipulated and agreed—my friend, the prosecutor, asked me, to save the time of having to bring the doctor from the hospital who pronounced the man dead—that the person alleged in the indictment was the same person who was at the Morgue.

(To Government counsel:) That is what you want?

Mrs. Stiles. Yes. I would like the stipulation that the doctor from Emergency Hospital, if here, would testify that the deceased was dead on his arrival at the scene at 7:48 p.m. on the date of February 8, 1947.

The Court. Would you mind stating the stipulation again? I didn't catch it very well.

Mrs. Stiles. It is stipulated between counsel that if the doctor from Emergency Hospital, Dr. Homer L. Isbell, were to testify, he would testify that when he responded to the ambulance call to 1718 9th Street, Northwest, on February 8, 1947, he found the deceased dead; he pronounced him dead at 7:48 p.m.

The Court. Give me the date again. On what date was it?

10 Mrs. Stiles. February 8, 1947.

Also counsel has stipulated—

The Court. Before you pass to that, is it stipulated that this stipulation may be accepted in lieu of the doctor's testimony?

Mr. Miller. Yes, sir.

Mrs. Stiles. That is right, Your Honor, to eliminate the necessity of bringing the doctor here.

The Court. Is there a further stipulation?

Mrs. Stiles. Counsel for the defense has agreed to stipulate that the deceased named in the indictment, Lee Hunter, is the same person upon whom the Coroner performed the autopsy—and of course the Coroner will testify in the case.

The Court. Very well.

Mrs. Stiles. And may I also say there is another stipulation? Counsel for the defense has also stipulated that the photographs that have been taken by the official Police Photographer in this case are true pictures taken at the scene shortly after the time of this incident.

The Court. That will simplify it. You may proceed, Mrs. Stiles.

Opening Statement on Behalf of the United States

Mrs. Stiles. May it please the Court, and ladies and gentlemen of the jury, as I told you, the defendant in this case is

11 charged in the indictment with first-degree murder, the indictment alleging that on or about February 8, 1947, within the District of Columbia, Baxter Griffin feloniously, willfully, purposely, and of his deliberate and premeditated malice shot and murdered Lee Hunter.

The evidence will show, ladies and gentlemen of the jury, that on the late afternoon of February 8, 1947, a number of persons had gathered at the home of Luvline Bost, at 1718 9th Street, Northwest, and were having a little party, and apparently played

some cards; that the deceased, Lee Hunter, came in during the party—and I believe the evidence will show he lived in this building also, with his wife and baby; that his wife and baby were also in the room; and that an argument arose between the deceased and the defendant as to—I think the evidence will show that the defendant used some language the deceased didn't like, and he did something to his baby that the deceased didn't like; and that the deceased made the statement to the defendant that, if he didn't stop, he would kick his teeth in; and that shortly thereafter the defendant left the place, apparently, the evidence will show, in a good humor, and told everybody goodbye.

But in about 15 or 20 minutes after that, he came back to the door, knocked on the door; and when the door was opened, he stood there with a gun in his hand and shot into the room, the first shot hitting the deceased, Hunter. And after that he
12 shot into the room a total of four more shots. Two of them, I believe the evidence will show, were shot through the door after the door was closed by someone on the inside.

Ladies and gentlemen of the jury, after we have provided this evidence, we will ask you to find the defendant guilty as indicted, of the deliberate and premeditated murder of Lee Hunter.

Opening Statement on Behalf of the Defendant

Mr. Miller. May it please the Court, and ladies and gentlemen of the jury, we will show you there was a crap game or some kind of a card game. We will show you there was a fight. We will show you that the defendant did not leave the house. We will show you by the Government's own witnesses—and thanks to the fairness and fineness of the distinguished prosecutor—that when the man was found, the dead man on the floor, we will show you, by the defendant, that he approached him and had his hand in his pocket and started toward him; that the defendant did shoot, not to hit him; but he had his hand in his pocket, and when he started toward him, the defendant shot him in self-defense. We will show you by the Government's own witnesses that when the unfortunate man was lying on the floor, the unfortunate man did have his hand in his pocket. With that, I am satisfied we won't have any trouble with the case.

The Court. You may proceed, Mrs. Stiles.

Mrs. Stiles. Call Daisy McCullough.

13 Whereupon, DAISY MCCULLOUGH, called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. Will you state your full name for the record, please? A. Daisy McCullough.

Q. And where do you live? A. Seventeen nineteen fifth street, Northwest.

Q. Directing your attention to the late afternoon of February 8, 1947, were you at 1718 9th Street, Northwest? A. I was.

Q. And in whose room or apartment were you? A. Lurline Bost's.

The Court. Just a moment. Whose apartment was it?

The Witness. Lurline Bost's.

Mrs. Stiles. That is L-u-r-l-i-n-e B-o-s-t.

The Court. What is the address?

Mrs. Stiles. Seventeen eighteen 9th Street, Northwest.

The Court. Very well.

By Mrs. Stiles:

Q. And what apartment is that? Do you know? A. It was Apartment One.

Q. What time did you go to Lurline's apartment? A. It was about two o'clock.

Q. And who was there when you got there? A. Lurline Bost, and Esther Taylor.

Q. And who was Esther Taylor? A. Lee Hunter's wife.

Q. Did she live in that same building?—if you know. A. Yes, she does.

Q. Did someone go there with you? A. Yes, he did.

Q. Who was that? A. It was a friend of mine by the name of Henry Harritt.

Q. After you got there, you tell the ladies and gentlemen of the jury just in your own words what happened during the evening or during the time you were there. First, what did you do? What were you doing that evening? A. Well, on that evening, Lurline Bost and I was—

The Court. I am afraid I am a little bit confused here. I thought you said it was the afternoon, and now the evening is mentioned. I am wondering which it is.

By Mrs. Stiles:

Q. You said you arrived there at about 2:30 in the afternoon? A. Yes.

Q. Did there come a time later when something unusual occurred? A. Yes, there was.

Q. Will you tell us when that was, to the best of your recollection. A. When it happened?

Q. Yes, when something unusual began to occur. Start with the time, if you recall. A. I would say about 6:30.

Q. Beginning there when something unusual began to occur, tell us what did happen, if anything. A. We was playing whist.

Q. Playing what? A. Playing whist.

Q. Whist? A. Yes.

The Court. Speak slowly and distinctly, so that all the jurors can hear you.

The Witness. We were playing whist. Charles Cornwell and his partner and myself and Baxter Griffin were playing whist. We stopped playing whist and had a pint of whiskey. We all taken a drink out of that. And we had two or three bottles of beer. We sat around and started talking. Baxter Griffin started playing with Lee Hunter's baby. Lee Hunter told Baxter Griffin to put down the baby, because he had been drinking.

Baxter Griffin said, "If you don't want me to play with your baby, I will take your wife and baby around to my house." Lee Hunter told him if he would do that, he would kick his teeth down his throat.

Baxter Griffin got up, put on his overcoat, and said that he was going home. He walks out the door and was gone about five or ten minutes. Then he comes back. There is a knock on the door. Lurline Bost opened the door. When she opened the door, she saw that it was Baxter Griffin. She turns to come back in the room. Just as she turned to come in the room, I heard a fire. I looked over in the corner and I saw Lee Hunter lying between the stove and the dresser.

Baxter Griffin said, "Aint nobody going to say they are going to kick my teeth down my throat and get away with it." Then he looks over in the corner towards me and sees another boy, Henry Harritt was over there. And he turned the gun over there and fired over there.

By that time Henry Harritt had pushed me over in front of the door, and Esther was sitting on the sofa in front of the door and asked Baxter Griffin, "Please let me out with the baby," and, "Don't hurt the baby." He told her to be quiet. She asked him again to let her out with the baby; and just as he said to be quiet, Baxter Griffin fired between her legs, down between her heels, on the floor.

Then Henry Harritt was behind me and pushed me toward the door. And he fell on his knees, and then somebody bolted the door down at the bottom, and someone turned out the light. And then we all started scrambling to try to get out

the window. Just then I heard two more shots come through the door.

By Mrs. Stiles:

Q. Was the door closed at the time these last two shots came through the door? A. Yes, it was.

Q. Now, where was the deceased, Lee Hunter, when the defendant came back in the house and knocked on the door? A. Standing next to the dresser and the oil stove, right in front of the door.

Q. And how far was that from the door? Measure it by something in here, if you can, how far you would say that was from the door. How far away was Lee Hunter standing? You say he was standing between the stove and the— A. And the dresser.

Q. And you say he was in front of the door? A. That is right.

Q. Can you show us, in here, about how far he was from the door? A. I would put it from where I am sitting to where you are.

Q. From you to me? A. That is right.

Q. And had he made any move to leave where he was standing when he was shot by the defendant? A. No, he did not.

Q. And did you see anything in his hand—any instrument of any kind? A. No, I did not.

Q. Did you hear him saying anything to the defendant, to Baxter Griffin? A. That is the only thing I heard him say, that I repeated a few minutes ago.

Q. That was before he left the house? A. Before he left the house.

Mrs. Stiles. You may question, Mr. Miller.

Cross Examination by Mr. Miller:

Q. What is your name? A. Daisy McCullough.

Mr. Miller. Will Your Honor give me about a minute?

The Court. Take whatever time you want, Mr. Miller.

Mr. Miller. Thank you.

By Mr. Miller:

Q. Do you remember testifying at the District Morgue, way down by the Congressional Cemetery? Do you remember being down at the Coroner's Inquest? A. I do.

Q. And you say you told the Justice and the jury that you saw him shoot the first shot? That is right, isn't it? A. I didn't see the—

Q. No. You told the jury you saw him shoot the first shot. That is right, isn't it? A. No, I did not tell them I saw him shoot the first shot.

Q. Well, did you see him fire the first shot? A. No, I didn't see him fire the first shot.

Q. And you testified that at the Morgue? Isn't that the truth? You said you heard the shot fired. That is right, isn't it? A. I did.

Q. And you also testified at the Morgue that you got behind the door. That is right, isn't it? A. I did.

Q. The man that got shot was mad with him because he was playing with the baby? That is the truth, isn't it? A. He wasn't mad.

Q. Well, he told him not to play with the baby. A. He asked him not to play with the baby, because he had been drinking.

Q. You all were drinking. Isn't that the truth? A. Yes,
20 it is.

Q. And you drank beer and whiskey and stuff in there. That is right, isn't it? A. We did.

Q. And the dead man and this man here were playing black-jack, weren't they? A. No.

Q. What were they playing? A. They were playing whist.

Q. What is the difference between blackjack and whist? A. I don't know, because I don't know how to play blackjack, but I do know how to play whist.

Q. When the dead man—he got up and started around the table, where he was—isn't that the truth? A. No; he did not.

Mr. Miller. May I use these pictures?

By Mr. Miller:

Q. And isn't it the truth that the dead man got up and started towards him and had his hand in his pocket? A. He did not.

Q. Now, will you look at that picture and see if he hasn't got his hand in his pocket lying on the floor there. A. That is the way he was standing when he was shot. He didn't have a chance to do anything. I don't guess he knowed what hit him.

21 Q. What? A. I don't guess he knowed what hit him.

Q. What are you saying? A. I say I don't guess the dead man knowed what hit him.

Q. Did he have his hand in his pocket? A. Yes, he had his hand in his pocket when he was standing up there by the dresser.

Q. And isn't it the fact that he had his hand in his pocket and he walked around towards this defendant, and that is when the shooting occurred? A. No, it did not occur in that way.

Q. You just said he didn't have his hand in his pocket. A. I did not tell you; he did not have his hand in his pocket. I told you when he was standing up there between the stove and the dresser, that is when he had his hand in his pocket, because we all were standing up there getting ready to go; and he was standing up there with his hand in his pocket and we were all laughing and talking.

Q. How many times have you talked this case over with other people? A. The only time I talked this case over was when we came down here.

Q. You talked it over before you went to the Morgue, didn't you? A. I talked about it when the Homicide Squad came to me.

Q. Didn't you tell them down at the Morgue that the man didn't have his hand in his pocket? Didn't you tell them down at the District Morgue that the man didn't have his hand in his pocket? A. You was down there?

Q. Don't you remember testifying down there, sitting at the table? A. No; I didn't see you; I saw another man down there.

Q. Isn't that the truth? A. I didn't tell you he didn't have his hand in his pocket.

Q. After looking at the picture, you say he had his hand in his pocket. A. He had his hand in his pocket when he was standing over there by the dresser. He had it in there all the time.

Q. Now, the dead man threatened to kick his teeth out, didn't he? A. Yes, he did—about his baby.

Q. Now, this morning, have you talked to anybody about the case, what you were going to testify to? A. No, I have not.

Q. You are sure about that? A. I am positive.

Q. You weren't out in the hall talking to another witness about this case? A. We wasn't talking about the case.

Q. The pint of whiskey, how much did you drink of the pint of whiskey? A. I drank about that much of the pint of whiskey (indicating), because I don't drink much whiskey.

Q. Was that two fingers, or just one? A. No; that was just one.

Q. Is it the truth that you claim he went out and he was friendly when he went out? Was he mad when he went out? A. No, he wasn't mad when he went out, because when he went out, he went out laughing.

Q. He went out laughing? A. That is right.

Q. Isn't it the truth the whole thing occurred just like that, when the man started toward him with his hand in his pocket? A. No, it did not.

Q. You are not mad with me, are you? A. No, I am not mad with anyone.

Mr. Miller. That is all.

Redirect Examination by Mrs. Stiles:

Q. You said you were standing up and getting ready to leave when the defendant came back and did this shooting? A.
24 Yes, ma'am.

Q. Had you stopped playing cards before he left? A. Yes, ma'am, we had.

Q. And had you stopped playing cards when he was annoying the baby, or the deceased thought he was annoying the baby? A. We had.

Q. What were you doing? Sitting around talking? A. Sitting around talking.

Q. You say you had a pint of liquor, and you mentioned some beer. How much beer? A. There was about three bottles, I would say.

Q. How many people drank out of that whiskey and that beer? Were all the people there doing some drinking out of these, the beer and the liquor? A. I don't know about everybody, but I know I had some myself.

Q. How many were there at the time this occurred? A. It was Lurline Bost, Esther Taylor, Baxter Griffin, Charles Cornwell, Fannie Pickett, and Henry Harritt, and myself.

Q. That is six, isn't it? A. That is right.

Q. Now, when the defendant came back, and did this shooting, where was he standing when he did the shooting? A. To my
25 estimation, he was standing right in the door, because he had a sight on everybody.

Q. He didn't come into the room? A. No, he did not.

Mrs. Stiles. That is all.

Mr. Miller. That is all, thank you.

The Court. You may step down.

(The witness left the stand.)

Mrs. Stiles. Call the Coroner, if Your Honor please.

Whereupon, DR. RICHARD M. ROSENBERG, called as a witness in behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. State your full name for the record, please, Doctor. A. Richard M. Rosenberg.

Q. You are Deputy Coroner for the District of Columbia? A. I am.

Q. Doctor, did you perform an autopsy upon one Ivy Hunter in the District of Columbia on February 9, 1947? A. I did.

Q. Will you give us the result of that autopsy, please. A. The deceased was a colored man 23 years of age.

The Court. Just a moment, Doctor. I suggest you speak
26 a little louder so that all the jurors can hear. You might talk into the microphone.

The Witness. The deceased was a colored man 23 years of age. He weighed 138 pounds, and was five feet nine inches tall. He had sustained a gunshot wound in the tip of his nose. The bullet took a course directly backward, slightly to the left, and passed into the structures in his brain. And this bullet wound, with the injury it caused, was the cause of his death.

By Mrs. Stiles:

Q. Did you examine the blood for alcohol, Doctor? A. The blood was examined for its alcoholic content and found to contain 13 hundredths per cent.

Q. And did you determine the cause of his death? A. I didn't hear that last

Q. Did you determine the cause of his death? A. The cause of his death was this gunshot wound in the nose, with the ensuing brain injury.

The Court. Will you state the alcoholic content again, please.

The Witness. Point 13—13 hundredths per cent.

The Court. What does that signify in respect to intoxication or lack of it?

The Witness. Ordinarily an individual possessing that much
27 alcohol in his blood is mildly intoxicated—not, however, enough to alter his activities to a great extent.

The Court. That is 13 hundredths per cent?

The Witness. Thirteen hundredths per cent.

By Mrs. Stiles:

Q. Doctor, were there any flash or powder burns anywhere near this wound? A. No, there weren't.

Q. A bullet entering the nose in such a position, could that be shot from a gun as far from the victim as you are from me?

Mr. Millet. Don't answer that until I have a chance to object.

I object to that.

The Court. Will you read the question, Mr. Reporter.

The Reporter (reading). "A bullet entering the nose in such a position, could that be shot from a gun as far from the victim as you are from me?"

Mr. Miller. I object to that.

The Court. Before I pass on the objection, I am going to ask the witness whether he can express an opinion in answer to the question concerning which he was just interrogated.

The Witness. I can.

The Court. I will overrule the objection.

The Witness. The answer is, it could.

Mr. Miller. Wait just a minute, now. The question was could it have been shot from the distance from you to him and it could.

28 The Witness. Yes, sir.

Mrs. Stiles. I believe that is all.

Cross Examination by Mr. Miller:

Q. How many feet away would you tell the jury that you would have to be where it would show powder marks? Two or three feet? Two feet? A. No, sir.

Q. How many feet? A. Powder burns and stipple—the word "stipple" means little punctate marks caused by the imbedding of unburned powder—those markings occur up to a distance of about 18 inches. After that, the distance of the gun cannot be determined. It can be any distance beyond that.

Q. Eighteen inches? A. Beyond 18 inches.

Mr. Miller. Thank you, Doctor. That is all, sir. Thank you very much.

Mrs. Stiles. That is all, Doctor.

May the Doctor be excused, Your Honor?

The Court. The Doctor may be excused.

(Witness excused.)

Mrs. Stiles. Call Esther Taylor.

29 Your Honor, at this time may I ask something I overlooked before? The photographer in this case went out to the witness room, and also two witnesses who were identifying witnesses and whose testimony has been dispensed with by stipulation. I wonder if they could be excused from the witness room.

Mr. Miller. I have no objection.

The Court. Yes, indeed.

Mrs. Stiles. They would be Officer Pilling, Leo J. Hunter and Bernie James.

Whereupon, ESTHER TAYLOR, called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. Will you state your full name for the record, please? A. Esther Taylor.

Q. And speak as loud as you can. All these ladies and gentlemen over here have to hear you.

The Court. Speak into the microphone right in front of you, and speak loudly and slowly and distinctly, so that everyone can hear you.

By Mrs. Stiles:

Q. Were you the wife of the deceased Lee Hunter? A. I was.

Q. And were you at 1718 Ninth Street, Northwest, on February 8, 1947? A. I was.

Q. Do you live in that building? A. I do.

Q. What apartment do you live in? A. The second-floor apartment.

Q. The second-floor apartment? A. Yes.

Q. And were you in Lurline Bost's apartment during that afternoon or evening? A. Part of the evening I was there.

Q. Is Lurline Bost related to the deceased? A. That is her brother.

The Court. I am sorry, but I don't think everyone can hear you. Move a little closer to the microphone and speak right into it.

By Mrs. Stiles:

Q. Now, you stated you were in Lurline Bost's room that evening when there were other people there, and a party was going on, of some sort. A. There was no party going on at the time I was there.

Q. Well, were there other people there? A. And were some more people there?

Q. Yes. A. Yes.

Q. What time were you there? A. I was there off and on from six to seven o'clock.

Q. Will you tell the ladies and gentlemen of the jury just what, if anything, unusual occurred in Lurline's apartment while you were there. A. Anything unusual that occurred?

Q. Yes. A. The only thing unusual that occurred in Lurline's apartment while I was there was Baxter Griffin shot.

The Court. Talk slowly so that we can all understand what you are saying.

By Mrs. Stiles:

Q. Suppose you start with the time you went there. You say you went there about six o'clock. Is that right? A. Yes.

Q. Who was there when you got there? A. When I went down in Lucline's room about six o'clock, Daisy McCullough and her boyfriend were there.

Q. And did some other people come in? A. Later Charles Cornwell and Fannie Pickett and Baxter Griffin came in.

Q. Who is Fannie? Is she here as a witness? A. Yes.

Q. Just tell us in your own words what happened after all these people got there, what you did and anything unusual that occurred. A. Well, after the people were there, Lee brought the baby downstairs to me about six-thirty.

Q. By "Lee," you are referring to the deceased, Lee Hunter. A. That is right. And it was time for the baby to go to sleep, and I took the baby upstairs and stayed, I guess, about five or ten minutes. And then I came back down, and while I was down there the baby began to cry and I went back up and got the baby.

Q. Talk slowly, as His Honor asked you. A. O. K.

The Court. I am going to have the reporter read the witness' answer as far as it has gone.

Could all of the jurors hear her?

Mr. Reporter, please read the witness' answer as far as it has gone.

The Reporter (reading). "Answer: Well, after the people were there, Lee Brought the baby downstairs to me about six-thirty.

"Question: By 'Lee,' you are referring to the deceased, Lee Hunter?

"Answer: That is right. And it was time for the baby to go to sleep, and I took the baby upstairs and stayed, I guess, about five or ten minutes. And then I came back down, and while I was down there the baby began to cry and I went back up and got the baby."

The Court. All right. Proceed.

The Witness. And when I brought the baby back down Griffin wanted to take the baby.

By Mrs. Stiles:

Q. You are referring to the defendant when you say "Griffin"? A. That is right. And Lee refused for him to take the baby. And he said "That is all right." And Lee told him if he bothered the baby, he would kick his teeth out.

Mr. Miller: He said what?

The Witness. He said if he [illegible] kick his teeth out.

Mr. Miller. That he would kick whose teeth out?

The Witness. Lee said that.

Mr. Miller. Yes? Who is Lee?

The Witness. The deceased.

Mr. Miller. All right.

The Witness: And Griffin sat around, I guess about five minutes, and later he said, "I believe I will go and get me a Pepsi-Cola." He was gone about ten minutes, and a knock came on the door. And Lurline opened the door and Griffin shot Lee and said: "I don't allow nobody to say they are going to kick my teeth out." And he continued to shoot, and after a while—

By Mrs. Stiles:

Q. What is that? I didn't get the rest of it. Did you stop? A. Yes, I stopped.

Q. After the door opened, the defendant said "I don't allow nobody to say they are going to kick my teeth out," and he shot— A. I beg your pardon. I didn't say that. He knocked the door open and shot Lee, and said "I don't allow nobody to say they are going to kick my teeth out."

Q. And what happened then? A. He continued shooting in the room.

Q. Where did those other shots go? A. One went over by the mirror by another man. And after he had shot Lee, I asked him "Don't do that." And he told me to keep quiet. And the third shot went down between my shoe heels. He shot at me. And after that someone from behind pushed me out of the door. And after I was out of the door, he shot back two times into the door, and went on out into the street.

Q. Did you see him shoot back through the door? A. I did.

Q. Where was Lee when the door opened and the defendant shot him? A. Lee was standing between the dresser and the stove.

Q. And what were everybody doing at that time? Were they playing cards, or what were they doing? A. There was no card games going on at that time. Everybody was standing, getting ready to go.

Q. And what did your husband, or Lee Hunter, do? Did he make any attempt to do anything to the defendant or go toward the defendant at any time? A. What you mean, after he shot him?

Q. Yes. A. No, he didn't see him when he shot him.

Q. Or before? A. He did not.

Q. Did you see anything in his hand at any time? A. I did not.

Mrs. Stiles. You may question.

Cross Examination by Mr. Miller:

Q. Isn't it the truth you weren't down there at all? A. You say what?

Q. Isn't it the truth you were not in the room when the shooting occurred? A. It isn't true. I was in the room when the shooting occurred.

Q. There is a dresser in the room. That is right, isn't it

36 A. That is right.

Q. There is an oil stove in the room. There is an oil stove in the room, isn't there? A. Yes, sir.

Q. And you claim that the defendant shot him at the door? That is right, isn't it? A. No; he stood at the door and shot him.

Q. And your husband wasn't near the door, then, was he? A. No; he was at the dresser and the stove.

Q. And isn't it the truth that your husband told him he was going to kick his teeth out of his mouth, and he started towards him with his hand in his pocket? A. It isn't true.

Q. Did he have his hand in his pocket when he went toward the door? A. He didn't go toward the door.

Q. Did he have his hand in his pocket when he was arguing with the man? A. He wasn't arguing with him.

Q. Did your husband have his hand in his pocket? A. When?

Q. When he was shot. A. Sure he had his hand in his pocket when he was shot.

Q. And isn't it the truth he went towards him— A. It

37 isn't.

Q. Will you wait one minute. Now, what was I going to ask you? Isn't it the truth he went towards him, over by the bureau and the stove—and will you wait one minute? A. I am waiting for you.

Q. Isn't it the truth your husband had his hand in his pocket and started towards him right by the stove? A. He did not start towards him, because he didn't know he was coming in to shoot him.

Q. Is that a picture of your husband with his hand in his pocket? A. Did you ask me did he go toward him when he was shot?

Q. Will you answer the question?

Mr. Miller. That is all.

The Witness. He wasn't going anywhere.

The Court. Have you any redirect?

Mrs. Stiles. No, Your Honor.

The Court. You may step down.

(The witness left the stand.

Mrs. Stiles. Call Lurline Bost.

Whereupon, LURLINE BOST, called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. Will you state your full name for the record, please. A. Lurline Bost.

Q. And where do you live? A. I was at 1718 Ninth Street.

Q. Were you living there on February 8, 1947? A. Yes, I was.

Q. In Apartment One? A. Yes.

Q. And was the deceased, Lee Hunter, your brother? A. Yes, he is my brother.

Q. Directing your attention to the late afternoon of February 8, 1947, did you have some company in your apartment? A. Yes.

Q. Can you name some of the people who were there? A. There was Daisy McCullough, and Henry—I don't know the last part of his name—and my mother was there.

Q. Was your mother there at the time something happened to your brother? A. No, she wasn't.

Q. Now, was Charles Cornwell there, and Fannie Pickett? A. Yes; they came there with Griffin.

Q. They came there with the defendant? A. Yes, they did.

Mr. Miller. Who was that came with him?

Mrs. Stiles. Charles Cornwell and Fannie Pickett.

By Mrs. Stiles:

Q. Will you tell the ladies and gentlemen of the jury what happened there that afternoon. Begin and tell us, first, did they have a card game there of any kind? A. Well, I wasn't downstairs; I was washing. You see, I don't have but one room; so I didn't see them playing cards.

Q. You weren't there when they were playing cards? A. No, I wasn't.

Q. Just tell what you observed during the time you were in the room. A. They were all sitting around, laughing and talking.

Q. When was this? Was the defendant there at that time? A. Yes.

Q. And Lee Hunter was there at that time? A. Yes.

Q. Then what happened, if anything? Just tell us in your own words. A. Just as I got downstairs, Griffin said he guessed he would go out and have a Pepsi-Cola. So I opened the door and let

him out and said good night, and said for him to come back again. So about five or ten minutes after that, someone knocked on the door. Well, I opened the door, and when I opened the door I looked up in Griffin's face, and I made a turn to walk back into the
40 room, thinking he was going to follow. So the pistol went off. Well, after that he said he didn't allow nobody to say they would kick his teeth down his throat. He said he ought to blow his brains out.

Q. Who was he talking to? Do you know? A. He didn't call no name.

Q. And who was shot, if anyone? A. My brother was shot.

Q. And where was he at the time he was shot? A. He was standing up, between the dresser and my stove. And some of the people were standing up, getting ready to go home.

Q. After he shot your brother, what, if anything, happened? A. He just began to shoot all around in the room.

Q. How many more shots did he fire? A. I don't know. I guess about three or four in there; but somebody from the back closed the door, some kind of a way.

Q. Then did he shoot any more after the door was closed? A. He fired two through the door after it was closed.

Q. Did he come into the room at all? A. He was standing in my doorway, in the hall, at my door.

Q. And he didn't come in the room at all? A. No, he
41 didn't. He didn't come inside.

Q. Did you see your brother at any time do anything to him or offer to do anything to him? A. No; he was standing up laughing, with his head half turned. He didn't see anything happen to him; it happened so quick.

Q. And the only thing you heard him say was— A. "I don't allow nobody to say they will kick my teeth down my throat. I ought to blow their brains out." And I didn't know what he was talking about, until afterward, when I heard from the others that he was talking about the baby or something.

Q. You hadn't heard anybody say they would kick his teeth down his throat? A. No; I wasn't there all the time.

Q. Then what he said was, "I don't allow nobody to say they will kick my teeth down my throat," and "I ought to blow their brains out." A. Yes, "I don't allow nobody to say they will kick my teeth down my throat," and "I ought to blow their brains out."

Mrs. Stiles. You may question.

Cross Examination by Mr. Miller:

Q. You said your brother was standing over by the— A. Dresser and the table.

42 Q. This dresser there (indicating on photograph)? A. Yes.

Q. And this is the table (indicating)? A. Yes, and the two right together, and he was standing right between them.

Q. And the stove is over there (indicating)? A. Yes.

Q. And this is the door to the room (indicating)? A. Yes.

Q. And you weren't there when they were playing cards? A. No.

Q. And this is your brother? A. Standing over between the stove and me.

Q. And you say your brother wasn't looking— A. He had his head over on the side, talking to someone. He wasn't paying any attention.

Q. What I am trying to find out is, was your brother facing him when he was shot? A. Yes; he was standing up, with his head turned, talking to somebody else.

Q. Didn't you say he had his head turned away? A. He wasn't right in front of the door, facing the door.

Q. He was facing the door, then? A. Yes.

43 Q. He didn't have his head turned? A. He could have had his head like that (indicating).

Q. When you said a while ago his head was turned, was it turned? A. No; it wasn't turned around like that (indicating).

Q. Half way? A. About half—just turned.

Q. And how far is that door from the dresser? A. I don't know—about ten feet.

Q. About ten feet? A. I reckon.

Q. Well, point to one of the jurors. From here to this lady, here to the third lady, is that about ten feet? A. I imagine so.

Q. Further than that? A. No; about there, I guess.

Q. Your brother was standing talking, and his hands were out in front of him, weren't they? A. I don't know. I didn't notice his hands. All I noticed is he was standing straight up when I looked over there.

Q. Did you notice whether he had his hands in his pockets? A. No; I didn't pay that much attention.

Q. Well, look at that picture. A. There is one hand in 44 and one out, in that picture.

Q. His hand is in his pocket, isn't it?

The Court. She said she didn't notice.

Mr. Miller. I am asking her now.

The Court. I don't think she can properly interpret the picture. The photograph has not been offered in evidence, and, when it is, it will speak for itself.

By Mr. Miller:

Q. Have you talked the case over with anyone in reference to what you are going to testify? You know what I mean. Have you talked it over with your sister-in-law or anybody? A. No. I haven't talked to her or nothing.

Q. You haven't testified at the morgue? A. No; she testified.

Q. You didn't testify, did you? A. No; she testified.

Q. And isn't it the truth you weren't in the room? A. No; I opened the door for him at the time.

Q. You are sure you opened the door for him? A. Yes, that is right.

Q. The other girl didn't open the door? A. No, I opened the door.

Mr. Miller. That is all.

Mrs. Stiles. You may step down.

The Court. You may step down.

(The witness left the stand.)

Mrs. Stiles. Call Fannie Pickett.

Whereupon, FANNIE PICKETT, called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. Will you state your name for the record, please. A. How is that?

Q. State you full name for the record. A. Fannie Pickett.

Q. And where do you live, Miss Pickett?

The Court. Just a moment.

(To the witness:) Will you speak loudly and slowly and distinctly, so that everyone can hear you.

The Witness. Fannie Pickett.

By Mrs. Stiles:

Q. And where do you live, Miss Pickett? A. 1230 Fourth Street, Northwest.

Q. Do you know the defendant in this case, Baxter Griffin? A. Well, yes. I met him during the summer.

Q. And do you know Charles Cornwell? A. Yes, he is a friend of mine.

46 Q. Directing your attention to February 8, 1947, did you go to the apartment of Lurline Bost with Charles Cornwell and the defendant, Baxter Griffin? A. Yes, I did.

Q. Now, did you know the deceased, Lee Hunter? A. No, I didn't.

Q. Had you ever been to this apartment before? A. No, I hadn't.

Q. Well, now, then you went to this house and met these other people for the first time that day? Is that right? A. No; I had been knowing Charles Cornwell, I would say around at least three or four years.

Q. I mean the people who lived there, Lurline Bost? A. That was the first time I met them.

Q. And the deceased and his wife, Lee Hunter, you met for the first time that day? A. That is right.

Q. You said you went there. Do you remember about what time you got there? A. Well, I wouldn't exactly know.

Q. First, did the defendant join you and Cornwell? A. At Charles Cornwell's house.

Q. And at whose suggestion was it that you go to Lurline Bost's apartment? A. Griffin's.

47 Q. The defendant? A. That is right.

Q. All right. You got there about what time, would you say? A. Well, I got to Charles Cornwell's house between 2:30 and 3:00 o'clock, and we went around there around four-thirty or five.

Q. After you got there, did anything unusual occur? A. Well, no, there wasn't when we got there. Griffin asked for—

The Court. Just a moment.

(To the witness:) Talk slowly, like I am talking, so that everyone can hear you.

The Witness. When we got there, Griffin asked for Lurline, and her mother said she would be back shortly. And she told us to come in and sit down, and we did; and she came in around about, I would say, 15 or 20 minutes later.

By Mrs. Stiles:

Q. Who was that? A. Lurline, which was Lee Hunter's sister.

Q. Lurline Bost, you mean? A. That is right.

Q. I see; go ahead. A. And then she came in and she spoke, and everything; and they all suggested—she spoke to Griffin and they all suggested to play cards. And Lurline asked for a bottle of beer, and Griffin sent out and got a pint of whiskey and two bottles of beer, and we started to play cards.

Q. What kind of cards were you playing? A. We were playing whist.

Q. Was the deceased, Lee Hunter, there at the time? A. No; he came in before we started playing, shortly after we got there.

Q. I see, all right. Go ahead, then. And you played whist for a while? Was there any argument over the whist game at all? A. No, there wasn't. Griffin started cursing, and when he did this Lee Hunter first spoke to him, to ask him to stop cursing; and he said, "Ladies is in the house." Griffin continued cursing. Then this Lee Hunter said he would kick Griffin's teeth out. And then shortly after that, Griffin got up and went out.

Q. Had you stopped playing cards before he left? A. Yes, we had stopped.

Q. And what were you doing when he got up and left? A. Well, after he started cursing, I got my coat to go. And after Griffin said, "I will see you all," he walks out. And they all suggested, since Griffin is gone, that we start playing cards again. Well, we hadn't started, and shortly, in about 10 or 15 minutes, someone knocked on the door; and Lurline Bost answers the door, and I recognize Griffin's voice, and he said, "I don't allow anyone to say they will knock my goddam teeth out." And that is when he fired and this Lee Hunter fell; and I ran behind the door, and he shot again. Someone closed the door, and that is when I jumped out of the window; and I recognized I had hurt my feet, and I ran up in the alley; and after I found out I was hurt, I came on back.

Q. Where was the defendant standing when he said, "I don't allow anybody to say they will knock my teeth out"? A. Well, he didn't come in. He didn't get no further than the door. He was at the door.

Q. And when he shot the deceased, where was the deceased? A. He was facing the door.

Q. And did he make any move toward the defendant, or to do anything to him at all? A. No. If he did, I didn't see it.

Mr. Miller. What was that. You say?

Mrs. Stiles. If he did, she didn't see it.

By Mrs. Stiles:

Q. And did he fire any more than that one shot which hit the deceased? A. Well, the first time he fired, he shot, this Lee Hunter fell. And the next time he shot, and I saw them close the door, and that is all I can remember, and I jumped out the window. I do remember the two shots was fired, but I don't remember any more, because I jumped out the window.

Mrs. Stiles. That is all.

Cross Examination By Mr. Miller:

Q. Who went out and got the whiskey and beer? A. I really don't know. I didn't see anyone, but Griffin and Charles Cornwell.

Q. Did you testify at the Morgue in this case? A. No, I didn't.

Q. And isn't it the truth that you were not in there until the thing had all happened? Do you understand that? A. I was there the whole time.

Q. Was your husband with you? A. No; my boyfriend.

Q. What is his name? A. Charles Cornwell.

Q. He testified at the Morgue, didn't he? A. Yes, he did.

Q. And you didn't testify? A. No, I didn't.

Q. You are sure he was cursing? A. Yes, he were.

Q. You couldn't be mistaken about that? A. No; he was really cursing.

51 Q. Didn't they have an argument about the child? A. Well, being my first time there, and all strangers, I didn't pay any attention about what was said about the baby.

Q. Isn't it the truth the defendant here picked the child up and was playing with the child, and the dead man told him if he didn't put the child down he would kick his teeth out? That didn't happen, did it? A. I didn't pay no attention about the baby.

Q. You were really there? A. Yes, but I didn't pay no attention about the baby.

Q. And you didn't hear no argument about the baby? A. No, I didn't.

Q. You are sure, and who opened the door? A. Lurline, which was Lee Hunter's sister.

Q. Loreen didn't open the door?

Mrs. Stiles. Lurline.

By Mr. Miller:

Q. You are sure she opened the door? A. Yes, she did.

Mr. Miller. That is all.

The Court. You may step down.

(The witness left the stand.)

Mrs. Stiles. Call Charles Cornwell.

Whereupon, CHARLES CORNWELL, called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. Will your state your full name for the record, please. A. Charles Cornwell.

Q. And where do you live, Mr. Cornwell? A. Seven eleven S Street, Northwest.

Q. Where are you employed? A. Government Printing Office.

Q. Do you know the defendant, Baxter Griffin? A. Yes, ma'am.

Q. How long have you known him? A. I have known him about two years.

Q. And did you know Lee Hunter, the deceased? A. No, ma'am, I didn't.

Q. Did you go to the apartment of Lurline Bost on the afternoon of February 8, 1947? A. Yes, ma'am, I did.

Q. And who went with you? A. Myself, Griffin, Fannie.

Q. Griffin and who? A. And Fannie.

Q. Fannie Pickett, the girl who just preceded you on the
53 witness stand? A. That is right.

Q. And whose suggestion was it that you go there? A. Griffin.

Q. Were you at your apartment before you went there? A. I was.

Q. And then when you arrived at the apartment of Lurline Bost, what did you do there? A. When I first went there?

Q. I say, what did you do when you got there? A. When we first went there, we didn't do anything but fool around for a while, and then we sent out and got a drink. And after that we played a couple of games of whist.

Q. Of whist? A. That is right.

Q. You said you sent out and got a drink? Is that what you said? A. Yes, ma'am—a pint of whiskey.

Q. The pint of whiskey? A. Yes, ma'am.

Q. Was the deceased, Lee Hunter, there at that time? A. When we sent out?

Q. When did he come? A. He came in shortly after the boy came back with the pint.

54 Q. And did there come a time when something unusual occurred during the afternoon? What unusual occurred, if anything? A. Well, after we quit playing cards, we all was over there, so I was in the other corner by the radio, and there was words spoken by Lee Hunter, about "I will kick your teeth out."

Q. Who said that? I don't know whether these ladies and gentlemen can hear you or not. A. Lee Hunter said that.

Q. Lee Hunter said that to whom? Do you know? A. To Griffin.

Q. Do you know why he said that to him? A. I do not.

Q. You didn't observe what preceded his saying that? A. No, ma'am, I didn't.

Q. Well, all right, go on. What happened after that? A. Then Griffin said, "You and your wife and baby all can go around to my house."

Mrs. Stiles. Your Honor, this man is a big man. I believe his voice could be heard better without that microphone. It seems to me so.

The Court. We will try it without the microphone, then, and see how it goes. I think the difficulty is, he can speak loud enough, but his articulation isn't very distinct.

Mrs. Stiles. Maybe that is it.

By Mrs. Stiles:

Q. Speak loud, now.

The Court. And slowly.

The Witness. After he spoke that, Griffin said, "You and your wife and baby all can go to my house." Well, I looked around, then, and the argument ceased. There wasn't any more said at all, until Griffin got up and told me and Fannie: "I am going." He said: "You can stay as long as you want to." So we all started to go.

The Court. Just keep your voice up, and speak loudly and slowly.

The Witness. So he said he was going, and Lurline went to the door with him, and he left. And that was all I know, until the knock came back at the door.

By Mrs. Stiles:

Q. And how long would you say it was before a knock came at the door? A. That was around about five or ten minutes.

Q. And then what happened? A. And when the door was opened, that was when the first shot was fired.

The Court. I don't believe we can hear this witness. Put the microphone back.

Mrs. Stiles. I can't hear with it or without it.

The Court. I think the difficulty is that the witness' enunciation is not very distinct.

By Mrs. Stiles:

Q. Now, then, when Lurline opened the door, you said this shot was fired? A. Yes.

Q. What, if anything, was said by anybody at that time? A. Well, at that time I heard a voice say, "Nobody can talk about kicking my teeth out and get away with it."

Q. And was that when the shot was fired? A. Well, just along about the same time, as close as I can remember.

Q. And where was Lee Hunter at that time? A. He would be opposite, across the room from me. He was standing facing the door, on the other side of the room.

Q. And did you see Griffin in the door at that time? Did you see him when the door was opened? A. No; where I was standing I couldn't see him in the door at all.

Q. And what happened after that? A. Well, this boy's wife and baby was standing in the door, and I could hear her pleading with somebody, "Let me out of the door," but I couldn't see who it was. So another shot was fired, and the door was slammed to, and there was a couple of more shots.

57 Q. After the door was closed? A. That is right.

Q. And did you ever hear the defendant say anything other than "Nobody can tell me they will kick my teeth in"? A. No, ma'am, I did not.

Q. Did you ever hear Lee Hunter say anything to him? A. No, other than when he said, "I will kick your teeth in."

Q. I mean, when the defendant came back the second time, did you hear Lee Hunter say anything to him at that time? A. No, I didn't.

Q. Did you see him make a move to do anything to him? A. No, I didn't.

Mrs. Stiles. I believe you may question.

The Court. Just a moment. I think there is a little confusion here in the record.

(To the witness:) You said you heard a voice say, "No one can say he will kick my teeth out." Whose voice was it? Could you recognize the voice?

The Witness. There was a radio playing at that time, and I was a distance from the door. I couldn't see to tell just who it was.

The Court. Could you see who fired the shots?

The Witness. No, I could not, from the position I was
58 standing.

Cross Examination by Mr. Miller:

Q. You testified at the Morgue you were over at the radio, didn't you? A. Yes, sir.

Q. And you didn't know anything happened until you heard the shot fired. Isn't that the truth? You testified down at the Morgue, as you told the distinguished justice a few moments ago, you didn't know who fired the shot. A. I didn't know who fired the shot.

Q. And didn't you testify down there you were over by the radio—

The Court. He testified that here.

By Mr. Miller:

Q. And you didn't know what happened until after the shot was fired. That is true, isn't it? A. How is that?

Q. You didn't know what happened until after the shot was fired. A. And the boy fell on the floor.

Q. That is right. And you say they were arguing; the dead man and he were arguing. Where was the argument? A. I didn't say there was any argument.

Q. Didn't you say a few moments ago that they were arguing? A. No, I did not.

Q. You did hear this man tell him he was going to kick his teeth out? A. I did.

Mr. Miller. And what is the girl's name, who was just here?

By Mr. Miller:

Q. Who did you go there with? A. Fannie Pickett and Griffin.

Q. And Fannie Pickett was right in the room there, wasn't she? A. That is right.

Q. You are sure about that? A. Yes.

Q. Was she standing over where you were standing by the radio? A. She was not.

Q. Everything was friendly in there—that is right, isn't it? before they broke up the card game? A. That is right.

Q. And you say that the defendant said he was going out to do what?—to get a Pepsi-Cola? A. He didn't tell me anything he was going out for.

Q. Did you say he was going out to get a Pepsi-Cola? A. He didn't tell me that.

Q. And you don't know, from your own personal knowledge, whether the dead man started toward him with his hand in his pocket, do you? A. No, sir; I don't.

Mr. Miller. Thank you very much.

Redirect Examination by Mrs. Stiles:

Q. Didn't you see Lee Hunter, where he was standing, at the time this shot was fired? A. He was standing over by the stove. But in the meantime I wasn't paying any attention to him. I and another fellow was standing over by the radio talking, and that is why I wasn't paying any attention to him at all.

Q. How many shots did you hear? A. I recall five.

Q. Five. And did you see where the others went? You said, after the first shot, Lee Hunter fell? Is that correct? A. That is right.

Q. And where did the others go? if you saw them. A. One went across the room, and there was another fired outside the door. That was before the door was closed. And after the door was closed, there were two more shots fired.

Mrs. Stiles. I think that is all.
Mr. Miller. That is all.
61 The Court. You may step down.

(The witness left the stand.)

The Court. I don't think we will call another witness before lunch. Before we suspend for lunch, I would like to inquire of counsel about how long this case will take.
Mr. Miller. It won't take me very long.
Mrs. Stiles. The Government is almost through.
Mr. Miller. I think we can finish it in less than an hour.
The Court. The only reason I inquired was to know how to arrange my schedule. I am not trying to hurry you.
Mr. Miller. You are not hurrying me.

(The recess was accordingly taken, at 12:30, until 1:45 p.m.)

After Recess

The Court. You may proceed.
Mrs. Stiles. Call Sergeant Vogelson.

Whereupon, Walter B. Vogelson, called as a witness on behalf of the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Stiles:

Q. Will you state your full name for the record, please. A. Walter B. Vogelson.
62 Q. And you are attached to the Homicide Squad of the Metropolitan Police Department, are you not, Sergeant? A. That is correct.
Q. Did you investigate this case—

The Court. This witness is a police officer, is he not?
Mrs. Stiles. Yes, Your Honor.

By Mrs. Stiles:

Q. You are a detective sergeant, are you not? A. That is right.
Q. Of the Metropolitan Police Department? A. Yes, ma'am.
Q. And you are attached to the Homicide Squad of the Metropolitan Police Department? A. Yes, ma'am.

Q. Did you investigate the case of United States versus Baxter Griffin? A. Yes, I did.

Q. And did you have a conversation with the defendant? A. I did.

Q. And where was that, Officer? A. That was at the office of the Homicide Squad.

Q. And when was that? A. About ten a.m., on Sunday, February 9.

Q. And what was that conversation, Sergeant?

The Court. Before we come to that, Mrs. Stiles, I wonder if I may interpose a question.

Mrs. Stiles. Certainly, Your Honor.

The Court. When was the defendant taken into custody?

The Witness. About 11:45 p.m. on February 8.

The Court. Proceed.

By Mrs. Stiles:

Q. What was this conversation you had with the defendant? A. I told the defendant he was being held in connection with the death of Lee Hunter, and asked him if he wanted to tell me what happened up there, and he said that he did. He then told me he had known that Lurline Bost, in whose apartment this trouble occurred, for a couple of months, and that he had been up there three or four times gambling.

On the night of February 8, he went there about a half hour before the shooting occurred, in company with Charles Cornwell and—I can't think of the other witness' name.

Mr. Miller. Fannie Pickett.

The Witness. Fannie Pickett. After they arrived there, they started a blackjack game, and he and Charles Cornwell and Fannie Pickett and Lee Hunter were playing. He said Lurline played for a short while—but she dropped out of the game.

While they were playing, he sent someone out and got a pint of liquor, and he had a couple of drinks out of the pint, and several of the other people had a drink, too. He said he was banking the game and had eight dollars in the bank, and that Lee Hunter hit the bank and had been playing a dollar. When he hit the bank, he claimed the whole bank, and when he didn't give him the money, he snatched the money from him.

Mr. Miller. Who did?

The Witness. Lee Hunter hit the bank and snatched the money from him.

The Court. What do you mean, "hit the bank"?

The Witness. The way he explained it, he had a total of eight dollars in the bank. Lee Hunter had been playing for a dollar. However, when he hit this time

The Court. You mean, when he won?

The Witness. Yes, sir; he hit a blackjack. That is 21.

Mr. Miller. I don't know, myself, Your Honor. That is the only game I don't know.

The Court. Some of us are not familiar with the blackjack game.

The Witness. Lee Hunter won this hand, and instead of claiming the dollar that he was playing from the bank, he claimed the entire eight dollars in the bank. The defendant objected, and Lee Hunter told him if he didn't like it, he would kick his teeth out. And at that time he got up from the table

Mr. Miller. Who got up from the table?

The Witness. Lee Hunter got up from the table, and started around the card table toward the defendant with his hand in his pocket; and he said at that time he shot him.

I asked the defendant if he had recalled firing more than one shot, and he said he did not, that he had been drinking. I also asked him what he had done with the gun; and he said on the way over to his brother's house, in Alexandria, while crossing the 14th Street bridge, he had thrown the gun in the river.

I asked him if the deceased had any weapon in his hand at the time he fired this shot; and he said no, he just had his hand in his pocket.

By Mrs. Stiles:

Q. Did you recover the gun? A. No, I did not.

Q. Now, Sergeant, did the defendant tell you anything about going home prior to this shooting, or, rather, leaving this apartment prior to this shooting, and coming back? A. No, he did not. He said the shooting occurred at the time of the argument over the card game, and that he had not left the apartment.

Q. And you say he knew nothing about whether he fired any other shots or not? A. He said he couldn't recollect that, that he had been drinking.

Q. How much does this defendant weigh, Officer, in your estimation?

The Court. I didn't hear your question.

Mr. Miller. She asked how much did he weigh.

The Witness. He was weighed over at the detention home, but I don't have his exact weight.

Mrs. Stiles. You may question.

Cross-Examination by Mr. Miller:

Q. He told you, Sergeant, they were playing blackjack. A. That's correct.

Q. And there was eight dollars in the bank. A. Yes.

Q. And that the play was for a dollar? A. Yes, sir.

Q. And that after the deceased bit, he tried to take the whole bank, and then defendant told the deceased he couldn't do it, and deceased got up from the table and told him he would [illegible]. That is right, isn't it? A. That is right.

Q. And he had his hand in his pocket and started toward him when he shot him? A. That is correct.

Mr. Miller. Thank you, Sergeant.

Redirect Examination by Mrs. Stiles:

Q. Did you go to these premises, in your investigation, Sergeant? A. Yes, I did.

Q. Did you observe any places where the bullet holes had been [illegible] in the apartment? A. Yes. There were two bullet holes in the outside door. There were two bullet holes in the south wall of the room. There was one bullet hole in the floor, just inside the door.

Mrs. Stiles. Mr. Clerk, would you mark these photographs as Government Exhibits No. 1, 2, and 3, for identification, please.

(The three photographs were accordingly marked for identification as Government Exhibits 1, 2, and 3.)

By Mrs. Stiles:

Q. Sergeant, I show you Government's Exhibit No. 1 for identification, what appears to be a door, and I will ask you if you can tell us whether you have seen that before. A. That represents the door leading from the hallway to the apartment.

Q. And is that the door you refer to as having bullet holes in it? A. That is correct.

Q. How many does it have? A. Two.

Q. I show you Government's Exhibit No. 2 for identification, showing a wall with a mirror hanging on it, and ask you if you have seen that before. A. That represents the south wall of the room, and shows two bullet holes.

Q. And I show you Government's Exhibit No. 3 for identification and ask you if you can identify that. That is the interior of the room. A. That represents the end of the room, showing the card table and the doorway.

Q. Are the bullet holes you referred to as being inside the doorway shown in that picture? A. The bullet hole that went in the floor would be in a position about here, but it doesn't show in the picture.

Mrs. Stiles. Your Honor, I would like to ask if the Sergeant could come down and point to the place where the bullet holes would be.

Mr. Miller. I have no objection if you do it yourself, Mrs. Stiles.

Mrs. Stiles. I think he knows where they are.

The Court. Shouldn't your offer them in evidence before you show them to the jury?

Mr. Miller. I have no objection.

69 Mrs. Stiles. Yes, if Your Honor please.

The Court. You are offering in evidence Government Exhibits 1, 2, and 3 for identification?

Mrs. Stiles. Yes, Your Honor.

The Court. They may be admitted.

(The three photographs heretofore identified as Government Exhibits 1, 2, and 3 were accordingly admitted in evidence.)

The Court. Very well. Proceed.

By Mrs. Stiles:

Q. Sergeant, will you come down and point out to the ladies and gentlemen of the jury the Government Exhibit No. 1, the bullet holes in the doorway. A. (Indicating on photograph before the jury.)

The Court. Just a moment, Sergeant. What you are saying has to be taken down by the reporter.

The Witness. This represents the doorway leading from the hallway into the apartment, and shows two bullet holes, one here and one here.

The Court. Which photograph are you referring to?

Mrs. Stiles. This is Government Exhibit No. 1.

The Witness. This is No. 1.

Mrs. Stiles. I think one of the jurors wants to ask a question.

The Court. Yes; you may do so.

79 Juror No. 9. I would like to know whether it is possible to identify the fact that the bullets entered the door from the hall side of the door or from the room side of the door.

The Court. Can you answer that question, Sergeant?

The Witness. Apparently the bullets entered from the outside; because the outside hole was clean and the inside hole was ragged.

The Court. Does that answer your question?

Juror No. 9. Yes, it does; thank you.

The Witness (continuing to indicate to jury). This represents the doorway leading from the hall to the apartment, and shows two bullet holes.

By Mrs. Stiles:

Q. Sergeant, showing you Government Exhibit No. 2, will you point out on this south wall. A. This is the south wall of the building; and shows one bullet hole here and one here.

Mr. Miller. Show it down at the other end.

The Witness (continuing to indicate to jury). This represents the south side of the building.

By Mrs. Stiles:

Q. Showing you Government Exhibit 3, will you show us on that if that is the location you refer to as having a bullet hole in the floor. A. The bullet hole in the floor is not shown in this
71 picture, but the bullet hole was about on this side about there (indicating on the photograph). This door leading into the apartment is open, and the bullet is about here.

Juror No. 3. On the Exhibit No. 2, which way is the door facing on that particular street?

The Court. Can you answer that, Sergeant?

The Witness. The front room faces east. You come into the hallway and go into the room, and as you go into the room, you are headed towards the south wall.

(The witness having returned to the witness stand:)

Recross Examination by Mr. Miller:

Q. The lady asked you, Sergeant, if you could tell in reference to the bullets in the door, and you told her—

Is this the inside or the outside of the door? A. That is the outside of the door.

Q. The outside? A. Yes, sir.

Q. And doesn't that show that there is a kind of bluntness there, like the bullet had gone from the inside out? A. No, sir. It looked like the bullet had gone from the outside in.

Q. You couldn't tell that, could you? A. Not definitely.

Q. Didn't he first tell you that after the thing happened
72 he went over in Virginia, and then went back home to give
himself up, and the officers were waiting for him? A. He
said when he left the place after the shooting, he caught a cab and
started to his brother's home in Alexandria, and on the way over,
when they were crossing the 14th Street bridge, he threw the gun
in the river.

Q. But didn't he tell you—

The Court. Let him finish his answer.

Mr. Miller. That isn't what I wanted.

By Mr. Miller:

Q. Didn't he tell you he went back home to give himself up, and the officers were waiting at the house? A. No, he didn't say that.

Q. Do you know whether the officers were waiting at the house? A. Yes, sir.

Q. Were you up there when the body was found? A. Yes, sir; I was there shortly after the body was found.

Q. (Exhibiting photograph) Does that indicate that the man had his hand in his pocket? A. Yes, sir; that is correct.

Mr. Miller. Thank you very kindly.

Mrs. Stiles. That is all.

The Court. Now I want to ask a question of you, Sergeant. Will you state again what statement was made by
73 the defendant to you, in reference to going over the 14th Street bridge, and what followed that.

The Witness. He said he caught a cab and started to go to his brother's house in Alexandria, Virginia. While he was crossing the 14th Street bridge, he threw the gun in the river. When he got as far as the Hot Shoppe, on the Virginia side of the bridge, he changed his mind and got out of the cab there. He then caught a bus back to 12th and Pennsylvania Avenue. When he got there, he caught another cab and went to the house of a man he worked for, on Minnesota Avenue, Southeast. But he wasn't clear about this man's name or address. He said he told this man what he had told me, about being in this game and shooting this man, and that this man advised him to give himself up to the police. He then returned to his home, and on his arrival at his home he was arrested.

Mr. Miller. That is all.

Thank you, Your Honor, for bringing that out.

(The witness left the stand.)

Mrs. Stiles. That is the Government's case, if Your Honor please.

Mr. Miller. Will you give me about five minutes? We'll take a five minute recess, please.

The Court. We will take a ten minute recess.

(Following the recess:)

Mr. Miller (to the defendant). Take the stand.

Whereupon, BAXTER GRIFFIN, the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Miller:

Q. Will you tell me your name, please? A. Baxter Griffin.

Q. How long have you lived in Washington? A. Around six years.

Q. What have you been doing for the last six years? A. I worked for a contractor.

Q. What is his name? A. Mr. Lewis Gray.

Q. Will you be good enough to talk slowly, so that the distinguished justice may hear, and the folks over here? A. Yes, sir.

Q. Do you remember this unfortunate affair, the night it happened? You went up to the place with a couple of people? A. That is right.

Q. Will you start right from there and talk slowly so that these folks can hear you. What happened? A. Well, the night I and Charles Cornwell and Fannie Pickett—

Q. Talk a little bit louder. A. We goes around to the house on Ninth Street, to Lurline Bost's—I and Fannie Pickett and Charles Cornwell and Lurline Bost, we started playing—

Q. Playing what? A. Blackjack.

Q. Will you tell me what blackjack is. What is blackjack? A. It is a game, is all I know.

Q. What? A. It is a game.

Q. Do you play with cards? A. Yes, you play with cards.

Q. Tell me how you work it. Is it like throwing three cards down? How do you work it? A. No, you hit, you see; 21 is the game.

Q. You keep dealing cards until you get 21? Is that the way it works? A. That is right. You hit yourself. If you begin with a six or eight or nine or ten, you hit yourself until you get up to 21.

Q. You were playing blackjack at this place, until this fellow got shot. Is that right? A. That is right.

Q. What happened while you were playing, and how much were you playing for? A. Fannie asked for a dollar, and Charles said two, and this other boy said: "Give me a dollar's worth." And he hit blackjack.

Q. He hit blackjack? A. Yes.

Q. And after he hit blackjack what happened? A. He said: "I call the whole bank." I had eight dollars in the bank, and he said: "I call the whole bank." I said: "You can't call the whole bank because Fannie and Charles done hit." So the argument started like that, and he snatched my money.

Q. Yes. A. And he jumped up and started around the table with his hand in his pocket, and told me he would kick my teeth out of my head. And that is when the shooting took place.

Q. Do you remember what hand he had in his pocket? A. He had his right hand in his pocket.

Q. And when he had his right hand in his pocket, did he come toward you? A. Yes, he did.

Q. And he said he would kick your teeth out of your head? A. That is right.

77 Q. And that is when you shot him? A. That is right.

Q. How did you come to shoot two or three other times? Do you know? A. I don't know. I must have got nervous.

Q. After that, you did leave there, didn't you? A. After the shooting occurred, yes.

Q. Where did you go? A. I went out and caught a cab and started over to Virginia to my brother's.

Q. Go ahead. A. And started over to the 14th Street bridge, and decided not to run away, and come back to my boss' house and told him about it, and he told me to go on up town, and I went back home.

Q. And when you got home, the police were waiting for you? A. Yes, sir. There were two in my apartment.

Mr. Miller. All right.

Cross Examination by Mrs. Stiles:

Q. You say you were playing blackjack, and that is when this argument started? A. That is right.

Q. You have heard all the other witnesses here testify you were not playing blackjack, haven't you?

78 Mr. Miller. I object to that.

The Court. I am going to wait until Mrs. Stiles finishes her question; then you can make your objection.

By Mrs. Stiles:

Q. You have heard all the other witnesses who testified here say they weren't playing blackjack, haven't you?

Mr. Miller. Wait a minute. I object.

The Court. I am going to overrule the objection. He can answer yes or no as to whether he heard.

The Witness. I heard what they said.

By Mrs. Stiles:

Q. Do you say they are not telling the truth?

Mr. Miller. I object to that.

The Court. Wait until Mrs. Stiles finishes her question.

Mr. Miller (to the witness). Don't answer this until I have a chance to object.

The Court (to Mrs. Stiles). Finish your question.

By Mrs. Stiles:

Q. And you say they are not telling the truth and you are telling the truth when you say you were playing blackjack?

Mr. Miller. I object to that, Your Honor.

The Court. Now I will hear you.

Mr. Miller. "Are you telling the truth, or are they telling the truth?"

The Court. Are you objecting to the question?

Mr. Miller. Yes.

The Court. Objection sustained. I don't think one witness can be appropriately asked to characterize the testimony of another witness. I have often sustained such an objection when made by the Government.

Mr. Miller. Thank you, Your Honor.

By Mrs. Stiles:

Q. Is it your testimony that you never left this house, from the time you went there with Cornwell and his girl friend, until after the shooting occurred? A. No, I never left at all.

Q. You didn't go home and then come back? A. I didn't leave the apartment.

Q. And you don't remember shooting but the one shot? A. No, I don't remember but shooting the one.

Q. That is all you remember? A. That is all I remember.

Q. You don't remember saying that "Nobody is going to say they are going to kick my teeth in"? A. No, I don't remember saying that.

Q. And you don't remember saying, "I ought to blow your brains out"? A. No, I didn't say that.

Q. You didn't say that? A. No, I didn't say anything to the man.

Q. You say when you left here you went over in Virginia? A. Across 14th Street bridge.

Q. And that is when you threw the gun in the river? A. That is right. I threw the gun out of the cab into the river. That is right.

Q. Why did you throw the gun into the river? A. I don't know.

Q. What? A. Why did I throw the gun in the river?

Q. Yes. A. I wanted to get rid of it.

Q. Because you knew you had killed this man with it? A. I didn't know whether he was dead or not. But I knew I had shot him.

Q. And you knew you intended to shoot him? A. I was defending myself. He said he was going to kill me.

Q. Why didn't you go to the police then, and tell them you shot this man to defend yourself, instead of throwing your gun away? A. Well, I don't know. I came back to give up, to tell them what I did.

Q. Why didn't you do that in the first place when you left the house? If you say you shot the man because he was coming at you with his hand in his pocket, why didn't you go straight to the police and tell them you had shot this man in self-defense? A. Well, it was just through a passion. I didn't know exactly what to do, to tell you the truth. Otherwise, I didn't know what I was doing, because I got nervous, see.

Q. Did you think you had a right to shoot this man if he was going to do something to you? A. To defend myself, sure. He said he was going to kill me.

Q. He said he was going to kill you? A. Yes, he did.

Q. I thought you said he didn't say anything; he just came at you with his hand in his pocket.

Mr. Miller. No, he didn't say that.

The Witness. I said I didn't say anything to him.

The Court. Before, you said he threatened to kick your teeth out.

The Witness. He did.

The Court. You didn't say he threatened to kill you, did you?

The Witness. After he said he would kick my teeth out, he said he would kill me.

The Court. Why didn't you walk out of the apartment, then?

The Witness. He was coming toward me, and it was a close little apartment there, and I couldn't get out.

(By Mrs. Stiles):

Q. Then instead of going to the police, you got in your car and went into Virginia? A. That is right.

Q. And on the way over, you threw your gun in the river? A. That is right. And I got out at the bridge and caught a bus and came on down town and got a cab and went out to my boss' house.

Q. After you left your boss' house, why didn't you go to the police then? A. I went home.

Q. Why didn't you go to the police? A. I knew they would be there waiting for me.

Q. You knew they would be there waiting for you? A. Yes I knew they would be there.

Q. So you went home to wait for the police to come? A. That is right.

Q. Are you the same Baxter Griffin who was convicted of simple assault in Alexandria, Virginia, in December, 1941? A. That is right.

Mrs. Stiles. I have no further questions.

Mr. Miller. Come around.

(The witness left the stand.)

Mr. Miller. And may I come to the bench, Your Honor.

The Court. Yes, sir.

(At the bench:)

Mr. Miller. Your Honor, I would like to ask you to strike your own question, when you said to the defendant: "Why didn't you walk out of the apartment?" I most respectfully submit, I think that is prejudicial.

The Court. I think it is a permissible question.

Mr. Miller. Because the Court of Appeals has said you don't have to retreat. You are going to tell the jury you don't have to retreat.

The Court. That might be different. The Court of Appeals has held this, that a person doesn't have to retreat unless he can thereby avoid an affray. Maybe he could have avoided an affray by retreating in this case. He gave a very satisfactory answer. He said they were so close together, he didn't have a chance to get out.

Mr. Miller. I don't know how he could walk out. "Why didn't you walk out of the apartment?" and I ask Your Honor to tell them in some way that that is wrong.

The Court. No. I differ with you; so I am going to deny the motion.

Mr. Miller. Well, that is all right. It is just for the sake of the record.

The Court. I understand. When you are trying a capital case, you have to protect your record.

Is there any rebuttal?

Mrs. Stiles. No, Your Honor.

The Court. Both sides rest?

Mrs. Stiles. Yes, Your Honor.

Mr. Miller. Yes, sir.

The Court. I just wanted to make out a schedule. About how long do you want for summing up? I am not trying to cut you short, but I do want to have an estimate and I don't want anybody to exceed his estimate. You can state as long as you want.

Mr. Miller. I will take 30 minutes, but probably won't use it.

The Court. And you, Mrs. Stiles?

Mrs. Stiles. I will say 30 minutes, and I probably won't use it.

The Court. A half an hour a side, and I will charge the jury in the morning.

Mr. Miller. May I make a motion for a directed verdict on the first degree?

The Court. No, I am going to deny your motion. For this reason, that I have to consider the evidence from the standpoint most favorable to the Government. The Government's evidence is to the effect that the defendant left the apartment and that he returned with a gun, and then shot the deceased. That being so, there was full opportunity and sufficient time for premeditation and deliberation.

Mr. Miller. Your Honor—

The Court. I want to put my reasons. So in that case the facts differ very greatly from those in the Rollins Gray case tried before me a few weeks ago.

Mr. Miller. There is no harm in my taking these exceptions.

The Court. No, I think in a capital case you have to.

Mr. Miller. All right, sir. That is all right with me.

The Court. Do you have any prayers?

Mr. Miller. No. You will charge them on retreat, the exact language of which Your Honor has?

The Court. Yes, I will.

Mr. Miller. Thank you.

The Court. Then you may proceed.

(Counsel having returned to the trial table:)

The Court. You may proceed, Mrs. Stiles.

Opening Argument to the Jury on Behalf of the United States

Mrs. Stiles. May it please the Court, Ladies and Gentlemen of the Jury: This is probably one of the briefest first-degree murder cases you have listened to, but by reason of its being brief,

think there is no danger that you can't remember all the evidence that has been presented to you. I think, too, that you probably will never have a better case of first-degree murder presented to you.

We have here every witness who has testified in the case, who has told you that all these persons, including the defendant, were at Lurline Bost's apartment on this particular afternoon; that they had something to drink—they had a pint of whiskey and two bottles of beer, I believe; they played some whist; and during the afternoon this disagreement occurred between the defendant and the deceased, resulting in the shooting.

Now, each witness there told you there had been nothing but whist played; that there had been no argument over cards. Each witness told you that the argument, between the defendant and the deceased, appeared to have been—with the exception of what one witness said she thought it was over—over the defendant's trying to play with or pay some attention to the deceased's baby. And the deceased objected, because, I believe one of the witnesses said, he said: "You have been drinking."

One witness said that she heard the defendant cursing, and heard the deceased call him down and say, "There are ladies here," and "so you should stop cursing." And each witness told you that the deceased said to the defendant, "If you don't", or intimated that if he didn't he, the deceased, would kick the defendant's teeth in, or out, whichever way it was.

And all the witnesses seemed to believe, the impression I got, and I am sure you did, was, that there seemed to be no serious disagreement about the thing, and they thought the defendant felt all right about it; that he stayed there a while; and the game was long since over and they all stood around talking, when the defendant said, "I am going home." And you will recall that two of these witnesses were friends of his—the man who testified, and the young lady. That was Charles Cornwell, I believe; and the young lady there with him, Fannie Pickett.

They both testified they were friends of the defendant, and that they had never been to this place before, and they had gone there at his, the defendant's, suggestion. And they said that he said to them, "Well, I am going home. You can stay, if you want to, or go." And he said good bye to everybody and went out.

And then all the testimony shows that in about 10 or 15 minutes, or five or ten minutes, somewhere along in there—and they all testified not over 15 minutes—a knock was heard on the door and Lurline Bost opened the door; and the defendant was there and immediately shot one shot into the room which struck the deceased, saying at the same time, "Nobody is going to tell me he will

kick my teeth in." And one witness testified he added, "I ought to blow your brains out," or words to that effect.

Now, then, every witness here told you that, that that is exactly what happened. And, on questioning, they all said the game was over; that there had been nothing played but whist; and on cross-examination by the defense attorney they said there had been no blackjack, and that the game was over and everybody was sitting around in good humor, just talking, when the defendant left the first time and then came back the second time and did this shooting.

According to every witness there, he shot one shot into the room and struck the deceased, Lee Hunter, who was standing across the room from the door, facing the door, at a distance which the witnesses testified was from that witness chair to me at the counsel table, and one witness testified it was from here to this lady in the jury box, which I would say is practically the same distance; and that he then shot again, over toward the south side of the room, and then he shot a third time, which the deceased's wife said struck between her feet on the floor; and then somebody got the door closed by that time, and he fired two more shots through the panel in the door. And you saw the picture the officer showed you of that.

Now, ladies and gentlemen of the jury, that is the testimony of every witness who appeared on this witness stand; and, if that is what happened, you will never have a better case of first-degree murder presented to you.

There wasn't one iota of evidence there of the shooting being done in self-defense. The witnesses were all asked if they saw the deceased attempt to make any sign or to do anything to the defendant, and they all said no, and they heard him say nothing in the world except "I will kick your teeth in."

They say when he was shot he was standing up over by the dresser, with his hand in his pocket, true. They were all standing up, they said, getting ready to go home.

Now, the defendant tells you an entirely different story. He told the officers that when he was arrested, and he has told you the same story here on the stand. But let us examine that story a little bit. In the first place, he tells you they were playing a game, a gambling game called blackjack, that the deceased was trying to take all the money. I believe he said he had eight dollars in the bank and the deceased attempted to take it, and when he objected that the deceased started at him with his hand in his pocket, and that is when he shot him. And he has no recollection of ever firing any other shots.

His story is that he never left the house, and that this all happened while he was there the first time. Now, ladies and gentlemen of the jury, you have that evidence to weigh against

the evidence of the other witnesses who have appeared here.

Let us examine the defendant's testimony a little further. He says "I shot the deceased in self-defense, and I immediately went out of the house and I hopped in a taxicab and made it for Virginia, and threw the gun in the river as I went by."

Now, ladies and gentlemen of the jury, is that the act of a man who had shot somebody in self-defense, or does that act show a consciousness of guilt as nothing else in the world could? I will say it shows the latter.

If you had shot a man you thought was coming toward you with something he had in his pocket—and that is what he is claiming, because he had his hand in his pocket, and he didn't say he saw anything at all—if you had shot a man to save yourself from death or serious bodily harm—and that is the only time you can claim self-defense, when you are in grave danger of death or serious bodily harm—would you have rushed out and thrown the gun in the river and gone over in Virginia, or would you have gone to the police, or would you have stayed there, maybe, until the police came, and said "Yes, I did it, but I did it because I had to save my own life"?

Now, ladies and gentlemen of the jury, you know what you would have done; you would have stayed there or gone straight to the police. You would not have tried to get rid of that gun, as
91 he did.

Then he tells you when he got over in Virginia, for some reason he didn't explain, he apparently thought different of it—I don't know why—but he comes back and tells you he goes to see his boss, and his boss advises him to go to the police and give himself up. Well, did he do that? No, he didn't do that. He goes back home. And, in answer to my question, "Why didn't you leave then and go to the police?", he said, "I knew they would come and get me."

When he got there, the police were there waiting for him, the officer said. But he didn't know it, and he didn't do one thing that a man who was guiltless of a crime would have done.

Now I will say to you, ladies and gentlemen of the jury, take that story. If you want to believe his story of what happened that evening, and disbelieve every bit of testimony given you by these Government witnesses, and take his story alone, if that is all you had before you, would you say he was a man who had shot in self-defense? By his own testimony, by his own conduct, would you say that? No, you wouldn't. As reasonable men and women, you couldn't. You would know that every act of that defendant, as he tells it to you himself, was the conduct of a man with the consciousness of guilt bearing down on him. He had killed a man and he wanted to get away and he wanted to get rid of the
92 thing he had killed that man with.

But, ladies and gentlemen of the jury, you have more than that. You have eyewitness testimony of what occurred that night. You don't even have to take his testimony at all. And I submit to you, in the face of the other testimony, that he is lying to you when he tells you what happened; and he lied to the police at the time.

Why? It was to his own self interest to have you believe he shot this man in self-defense. But even he can't explain his own conduct sufficiently to make you believe that.

Now, the witnesses all told you what happened there that evening, and it is perfectly reasonable to believe that his feelings were something like this: He apparently was an older man than this man he shot. He apparently was a much bigger man than this man he shot. He apparently resented being told by this younger man that he would get his teeth kicked in if he didn't keep his hands off his baby, or if he didn't stop swearing in the presence of the ladies—whatever it was he had done. And although he did nothing about it then and said nothing about it, and apparently to all the observers he didn't seem to mind it, it was rankling in his breast. He was getting madder by the minute. And so he gets up and goes home, or goes somewhere. We don't know where he went. And all the time he was brooding over that insult before the rest of the crowd—and remember two of these people were his own friends he had taken there.

So he gets this gun, if he didn't have it at the time, and he comes back; and the first thing he says when that door is opened is, "Nobody is going to say they are going to kick my teeth in," and, "I ought to blow your brains out." And he forthwith did it, and then he was obviously so wrought-up that he fired four more shots. And it is lucky for him, ladies and gentlemen, that he is here for killing only one man here today, instead of five—or women, because the rest of those shots all went wild.

Ladies and gentlemen of the jury, as I said before, the evidence is clearer here than in any case you will ever have before you. There was nothing done here in self-defense, because at the time he came back and that door was opened and he shot this deceased, the deceased was standing over by the dresser talking to his friends. They were getting ready to go, and he probably had his hands in his pocket. You noticed counsel for the defense was asking about that all alone. But that hand in the pocket just at that time was a different thing from the story the defendant tells of a hand in the pocket when they were gambling and playing cards—which the other witnesses said they never did, or, rather, that the card game was entirely over when the shooting occurred.

There wasn't one iota of self-defense in that. This man was standing in the hallway of, at the entrance to the room,

where he had his back to the great outdoors and wasn't in danger of anything. All he had to do was step back and be gone. Or he need not have come back there if he thought he was in any danger. But he came to that house and stood at that doorway, with the room full of people, and shot into that room with the most dangerous weapon there is. So, ladies and gentlemen of the jury, you don't have self-defense. You don't have any provocation whatsoever for this shooting. You have cold, premeditated malice. And it doesn't matter that it was a matter of 60 or 15 minutes that it was premeditated. That is just as sufficient as though it had been a week. And that, ladies and gentlemen of the jury, is all you need for a first-degree murder, and you have never had a better picture of it in your life.

I submit to you, ladies and gentlemen of the jury, that the evidence before you justifies you in finding this defendant guilty as indicted.

Argument to the Jury in Behalf of the Defendant

Mr. Miller. Mr. Justice Holtzoff and Ladies and Gentlemen of the Jury—and let me have those pictures, please—you heard these witnesses testify. You saw their attitude on the stand. You will be told by the distinguished justice that when listening to and examining the testimony of witnesses you take into consideration the way they testify, their attitude, and their demeanor on that stand. You saw each and everyone of those witnesses, and you saw when I was trying to ask the lady in reference to the—

(To Government counsel.) I want the picture with his hand in his pocket.

Mrs. Stiles. That is not in evidence.

Mr. Miller. Yes, they are all in evidence.

Mrs. Stiles. Your Honor, the Government has placed in evidence three of these photographs. I am not offering any objection to them.

The Court. The only photographs in evidence are Government Exhibits 1, 2, and 3.

Mr. Miller. May it please Your Honor, in the opening statement to the jury Mrs. Stiles said that she asked me would I stipulate with her that they were the pictures taken at the scene.

The Court. That is correct; and from the stipulation, they are in the record.

Mr. Miller. Then I would like to offer them in evidence.

The Court (to Government counsel:) Do you have any objection?

Mr. Stiles. I have no objection. I would like Your Honor to look at them.

The Court. It is a little irregular to offer them at this time.

Mrs. Stiles. The Government is willing.

The Court. In the absence of an objection, they may be admitted.

Will counsel come to the bench, please.

(At the bench:)

The Court. Why do you want to offer these photographs?

Mr. Miller. Because of the way the man was found in the room when the police got there, and this is taken by the police.

The Court. If the Government had offered them in evidence, I would be slow to admit them, because it might inflame the jury.

Mr. Miller. I want them in evidence.

The Court. I want to make it clear I am admitting these photographs only on the motion of the defendant.

Mr. Miller. That is all right.

The Court. If the Government had offered them, I would have hesitated to admit them, for that reason.

Mrs. Stiles. That is why I didn't offer them.

The Court. I would have hesitated to admit them at the Government's request.

First mark them as Defendant's Exhibits 1, 2, and 3.

(The three photographs were accordingly identified as Defendant's Exhibits 1, 2, and 3.)

(Counsel having returned to the trial table:)

Mr. Miller. May it please Your Honor, at my suggestion, I would like to offer them in evidence. You said you would let them go in.

The Court. Yes. They may be admitted as Defendant's exhibits.

(The three photographs heretofore marked for identification as Defendant's Exhibits 1, 2, and 3, were accordingly admitted in evidence.)

Mr. Miller (resuming argument in behalf of defendant). Ladies and gentlemen of the jury, I don't blame her for not offering them in evidence. This is a serious situation, serious to me, to you, and to everyone else. And when we come into a court of justice and you ladies and gentlemen have been here day in and day out, and you have watched the distinguished justice every day and every minute, instructing and trying to help do the square and right thing for the unfortunate defendant that stands before the bar of justice, and when anybody in the capital of the United States and we are still in America and not over in Germany or any other place, and I say to you that when they have evidence tending to show to you that the man is lying on the floor with his hand in his pocket, and they don't offer the photographs in evidence, and they

roll upon the defendant to offer them in evidence. I say the fact has come that we might as well take Lincoln from in front of the building.

This is the picture of the man, and I would like to pass it to you, to pass it to the jury. The defendant said he was on foot around the table towards him, and that he had his hand in his pocket. Did he say that for the first time today? He said that the very day he was arrested and that the officer went up to the place and found those very conditions. The police did.

He didn't take these pictures; the police department took these pictures. And it shows to you that when he was found it was just as the defendant told them the day he was arrested, when he went back home to give himself up.

Mrs. Stiles said, "Why did he do this? Why, you people would not have done this. You would not have done this." But, ladies and gentlemen of the jury, you are not in the same position of that colored man. You don't know what schooling he had. He said he was there in the room and playing this game, and the man grabbed the money and there was an argument there around the table. And the man said, "I will kick your teeth out," or "I will kill you," and he started toward him in a menacing manner with his hand in his pocket. And I say to you that under the law he was justified in doing what he did.

And let me have the other pictures. Here is my idea about this; and this good lady on the jury, she had a right to ask about it, to ask the officer if he could tell whether the bullets were from the inside or from the outside of the door. And he said, "Well, they looked like they were shot from the outside." And he was asked again, "Could you tell us from these photographs that you are sure of that?"

No, he couldn't. What would you want to be done? What would you want done if you were charged with some heinous crime? Wouldn't you want to have this panel of that door brought to court where they could be examined? How on earth could you tell or could anybody else tell from those pictures whether the bullets were fired from the inside or from the outside.

The other good gentleman there asked a question, which way was the room facing; and after the answer, it showed just exactly what the defendant said was the truth; that there was no shooting from any door. The shooting was all inside.

And here is the table. This is taken after the thing is all over; and they said he was at this door, and you folks can see the door at which they claim he stood when the shooting occurred. And this was supposed to be, madam, an answer to your question; and I want you to look at this picture. You wanted to know whether the door looked like it had been shot from the inside or the outside.

to deliberation. This interval of time may be brief, it may be very brief indeed, because at times the human mind works very rapidly. But this interval must exist, in order to justify a verdict of guilty of murder in the first degree.

The Government's evidence in this case is that very largely of those persons who were present in the room in which the killing took place. Their testimony is that the defendant left after the verbal altercation, and returned about 5, 10 or 15 minutes later — the estimate of the time varying according to the various witnesses — that upon his return he immediately shot the deceased, saying immediately after firing the gun, "No one is going to say to me he will knock my teeth out," or words to that effect; and that after the defendant shot the deceased, he continued shooting, so that three or four more shots were fired immediately thereafter.

If you believe the Government's witnesses and accept this version of what occurred, you then have a right to find that there was sufficient time for deliberation and premeditation between the time the defendant left the premises and the time at which he returned, and you have therefore a right to draw the inference that the deliberation took place and that there was premeditation; and you have a right, then, to find the defendant guilty of murder in the first degree.

There is a lesser degree of murder, known as murder in the second degree, and here is the distinction between the two degrees. Murder in the first degree is murder committed with malice, with a purpose and intent to kill, and with deliberation and premeditation, as I have outlined to you. On the other hand, murder in the second degree is murder committed with malice, but without purpose or intent to kill, or without premeditation and deliberation.

A killing under the influence of passion, induced by insufficient provocation, may be murder in the second degree. An accidental or an unintentional killing constitutes murder in the second degree, if it is accompanied by malice. Consequently, if you find that the defendant killed Lee Hunter with malice, bearing in mind the definition of malice that I gave you a few minutes ago, but that the killing was without premeditation and deliberation, or without purpose and intent to kill, you may find the defendant guilty of murder in the second degree.

Or, if there is a reasonable doubt in your mind as to whether there was a purpose and intent to kill, or whether there was any premeditation and deliberation, but you find there was malice, you may then find the defendant guilty of murder in the second degree rather than guilty of murder in the first degree.

There is still a lesser crime, known in the law as manslaughter. Manslaughter is the unlawful killing of a human being, without

The officer said it looked like it was from the outside, and I asked him could he be sure, and he said he could not be sure.

You heard everyone of those witnesses. You folks go out tonight and stand on the corner and see an accident. In your mind you will have a photographic picture of what happened. There is no one of you who would come in here tomorrow and dovetail who did this, and he did that, and somebody stood there, and this happened over here.

Didn't they talk it over? When I asked them, didn't they, every one of them, say what happened, except the last two witnesses, and the colored girl said he was cursing and the trouble started over the cursing? And you know there was no cursing, because the witnesses said when the thing was all over, he left and everything was pleasant.

My friend said he had murder in his heart and he went away. Did Mrs. Stiles ask him, before he went out, if he had a gun on him inside? No. There is no evidence in this case he went out and got any gun. You heard what he told the officer the very day this thing happened.

As I said before, you saw the witnesses on the stand. Mrs. Stiles said this is a quick case. As I have always said, why ask a whole lot of foolish questions? I could have kept this case going all day today and all day Monday. But I don't try cases that way. When I see witnesses are coming in before an American jury — and our people are intelligent — and you have seen every one of those witnesses, except one, tell you the identical, the same story. And they couldn't be mistaken. And one of them I asked to look at the picture. You saw the attitude. I asked her if she was mad at me, and she looked like she was going to jump out of that chair and jump on me.

Here is another picture. It shows him lying over just exactly what the defendant said happened; and it will be passed around to you showing just exactly what the defendant said happened, that he was shot in a struggle.

If you jurors will look at the door, there is the door. And here is the man out of the picture, over at the other side of the room, over near the bureau and the other part of the room. Don't you see that the struggle occurred in the room? It is the picture of the place in the room, not near the door.

And Mrs. Stiles, of course she is struggling here, rightfully, to do her duty. She asked the coroner how far away he had his pistol, and I asked him could it have been 14 or 15 inches and it would have showed powder marks. She thought he was going to say the powder marks would have to be 15 or 20 feet away.

She says murder in the first degree, and I say that if ever a case — and I have struggled around here a long time — how on earth

could anybody come before you, an American jury, with any common sense, and ask you to convict that man of anything when the physical facts and the pictures taken by the Police Department show you that the man had his hand in his pocket when the Police got there. I could stand here and talk a week, but I don't think you have to do that to an American jury.

"Why didn't you give yourself up?" The man said, "Well, I shot the man, and I was nervous and I went over there. I was going to my brother's house. And when I got over there, I decided I had better go to my boss's, and then I went home to give myself up."

"Why didn't you give yourself up before?" The man said he was nervous. She asked you what you would do. There is a difference between what you would do and what they would do.

You will be told by the distinguished justice as to the law, and I am not going into that. And you will be told that if this man was in this situation where he was standing in this room, and this man approached him in a menacing manner, that is to say, with his hand in his pocket as he approached him, he didn't have to move an inch; he could stand his ground.

You will be told tomorrow morning by the distinguished justice what the law is. He will tell you that while the defendant was there, and if this man approached him in the manner the defendant said, with his hand in his pocket, he didn't have to move one inch, and he could stand his ground.

And about the shooting two or three times, that has nothing to do with this. He said he was nervous after he shot the pistol off, and he may have shot a couple of more times.

And I again say to you, that was a fine question the lady
103 asked about the panel. It was so easy to bring it down here.

And this is a serious situation. If you find this man guilty of murder in the first degree, the judge hasn't anything to do but sentence him to death by electricity. But how on earth can anybody stand here and ask for that, with the physical facts and the testimony corroborated, corroborating the defendant in everything he said? The picture shows how it happened.

Mrs. Stiles said he did go up there with two other people to play cards. And every one said there wasn't any blackjack game going on. You know they weren't telling the truth—the wife of one and the sister of one—what else would you expect them to do?

Mrs. Stiles says the defendant is lying. But I say when they come in here and present what has been presented to you, if there is ever a case in a court of justice where there is self-defense, this is the case.

Now, take that case. A man is playing with a baby. There is no trouble at all. They are all playing there and laughing, and there

is no trouble. He goes out, and there is no trouble with anybody, and five minutes later he comes back and starts shooting. You know things like that don't occur. Common sense tells you things don't occur like that.

If he had had some trouble and called them SB— and so forth, and said "I will be back, and will come back shooting," it would be a different situation. But there he was playing with the baby. How on earth can you slips anything against him, unless you believe he went out? He said he did not.

When he was arrested, he told that fine policeman what every day you hear them criticizing the police, and you always hear me say something nice about them, because you very seldom hear of an officer coming in here and putting his hand on that Book and not tell the truth. He said he talked to him and he told him what happened; that they were playing blackjack and there was eight dollars in the kitty; the man grabbed the money and then got up and started toward him; and he told him he had his hand in his right hand pocket. And when he got up there and took the picture, there he was laying on the floor with the man's hand in his right-hand pocket.

Ladies and gentlemen, I am not going to take any more of your time. You heard the case, and you are intelligent enough to know what is going on here. Tomorrow, you listen to the distinguished justice tell you the law, and tell you you don't have to retreat; and if he was in the room when the man started after him, and you believe that, you don't have to move. You have the right to take the most reasonable course, and I ask you to bring in a verdict of not guilty.

Closing Argument on Behalf of The United States

Mrs. Stiles. May it please the Court and ladies and gentlemen of the jury, counsel wants you to believe that the Government didn't want you to see these pictures of the victim lying on the floor. Of course, ladies and gentlemen of the jury, I don't know how many cases of killings you have sat upon; but if the Government had offered these pictures showing the victim lying bleeding upon the floor, the Government would have been accused of trying to inflame the jurors' minds by bringing these pictures of the victim lying bleeding on the floor; and there would have been objection.

Mr. Miller. I would not have objected.

Mrs. Stiles. And what Mr. Miller would or would not have done, ladies and gentlemen, is not in evidence in this case.

I am very glad to have these pictures in, and I would of course like to get them in when trying cases, not to inflame the jury, but because the pictures always tell things we can't tell in words.

Now, then, counsel says he wanted this picture in so that he could show you the deceased had his hand in his pocket. He didn't need to have the picture in to tell you that, because it had already been testified to by witnesses on the stand. You were told he was standing there with his hand in his pocket talking to the people as they were getting ready to leave. And there was nothing strange about that. But what he wants you to believe is that this is the hand in the pocket story that the defendant is telling; that this is the hand in the pocket when the deceased started around the card table to get the defendant when he shot him over the blackjack game he is telling you about.

Now, ladies and gentlemen of the jury, will you look at this—see that card table on which the card game had been played during the evening, whether whist or blackjack or what not. It is the frailest kind of a card table. We all know how substantial card tables are at their best. If the defendant was telling you the truth and this deceased started around that card table with a hand in his pocket, and the defendant had shot him, would that card table be standing in the position it was standing in when the picture was taken? I don't mean by that that the card table would be standing there. I don't mean it would not have been moved. But wouldn't this body of this man going down have taken down that card table with it? And wouldn't the body of a man obviously as heavy as he was—and I have forgotten the exact weight now—I submit, going down in a dead weight, have crushed the card table, if he was standing there by it when he was shot?

But this picture bears out the testimony of the Government witnesses, who told you the deceased was standing over by the dresser with his hand in his pocket, talking to them when they were getting ready to leave. And right there is where he slumped down when he was shot. And you remember one of the witnesses said, "I don't think he ever knew what struck him." And there he is, ladies and gentlemen, and there is no card table in sight and no evidence he was coming around the card table when he went down in death at the spot.

Here, also, there is another picture of the victim, taken at another angle, showing his head a little out of sight, but showing the card table. And yet here is the card table way over here. And here is the body over here back against the dresser, between the dresser and the stove.

These pictures bear out the story the Government witnesses told you, that the deceased was standing over by the dresser with his hand in his pocket, talking to somebody, when they were getting ready to leave, when the defendant came back through that door and shot [in the doorway. He wasn't in the room, according to

those witnesses, and this did not occur at the time the card game was going on.

Now, counsel says to you that the officer was indefinite about whether these bullet holes, in answer to this lady's question, came from the outside or the inside. I didn't think there was anything indefinite about his testimony. And if there were, you heard the witnesses who had preceded him on the stand tell you that the door was suddenly shut and then two more shots came through the door.

And one of those witnesses, I think the first one on the stand, I am not positive, said she got outside and saw him shoot back through that door after it was closed. So these last two bullet holes came from the outside."

Now, ladies and gentlemen, counsel says to you that this defendant couldn't remember about these other shots. It is strange he could remember about the one and just why he fired that one, and can't remember about the other shots. It is strange indeed. But he had to remember something about this first one, because that is the one that brought him here today. And therefore he had to think up a likely story about that one, and he couldn't think up a likely story about the other four.

If you shoot a man in self-defense, as he claimed he did, you don't go right on shooting four or more times after he has dropped to the floor, whether you know he is dead or not. So he couldn't explain the other four shots. Therefore he just forgot them. Loss of memory is a wonderful thing when you can't think of a good reason.

Now, ladies and gentlemen of the jury, the testimony about his gambling, in this blackjack game, and the testimony of the other witnesses that they were playing whist, that counsel has magnified, personally I wouldn't see that it makes any difference. We don't care whether they were gambling, or what kind of a game it was.

The only question we are concerned with is did this occur at
109 the time the card game was going on, or after it was over; or did the shooting occur in self-defense, or did it occur as alleged in the indictment, by premeditated and deliberate malice on the part of this defendant, who got sorer and sorer and madder and madder at this deceased because he had told him he would kick his teeth in, right there before all these people, two of whom were his own friends he had brought there.

And keep in mind these two friends have come in here and testified and told you exactly what the other witnesses have said. They came in here like all good citizens and told you what they saw. So I say to you, ladies and gentlemen of the jury, you have just one thing to determine, and that is whether or not the Government witnesses have told you the truth, or whether the defendant has told you the truth. And if you consider the defendant's story, as I said

to you before, his own conduct tells you that he is not telling you the truth, that he didn't shoot anybody in self-defense. He said he shot in self-defense, because if he had, his conduct following the shooting would not have been what it was—and that was to try to get away, and to hide the weapon, which he did successfully at the bottom of the Potomac River that the officers could not find it. And then he comes in here and says he shot in self-defense.

I say to you, ladies and gentlemen of the jury, if there ever was a case of first-degree murder, this is it. And your verdict and what the Court will do are two different things. When you took your oath, you took your oath to decide this case on the evidence. And I know you will do it, and I say to you you cannot, on the evidence here, find this man guilty of anything less than first-degree murder.

The Court. Ladies and gentlemen, we are going to suspend at this time until tomorrow morning, and I will deliver my instructions to you the first thing tomorrow morning. I am going to ask you to be very careful not to discuss this case over night, not even amongst yourselves, not even amongst your families; and don't let anybody talk to you about it. Keep an open mind, until the case is submitted to you tomorrow. You will be excused at this time, and please be back in your seats a few minutes before ten o'clock tomorrow morning.

(Accordingly, at 3:25 p.m. the trial was adjourned until 10 o'clock the following morning, Friday, March 28, 1947.

Reporter's Certificate

This record is certified by the undersigned reporter for the District Court of the United States for the District of Columbia to be the official transcript of the proceedings indicated.

THOMAS O'NEAL

In the District Court of the United States
for the District of Columbia

Criminal No. 240-47

United States
v.
Baxter Griffin

Washington, D. C.
Friday, March 28, 1947

The trial was resumed at 10 o'clock a.m., before Hon. Alexander Holtzoff, Associate Justice, and a jury.

Appearances:

For the United States:

Mrs. Gaynor B. Smith,
Assistant United States Attorney.

For the defendant:

Mr. Roger J. Miller,
426 5th Street, N.W., Washington, D. C.

PROCEEDINGS

The Clerk. All arraignments and sentences will be taken up after the Court has charged the jury in the case on trial, and counsel may be excused until that time.

United States versus Baxter Griffin.

Mr. Miller. May it please the Court, I come to the bench with Mrs. [illegible] for a minute?

The Court. Yes, indeed.

(At the bench.)

Mr. Miller. I would like Your Honor to charge that, handing down the decision [illegible] from the Supreme Court of the United States.

The Court. Here is what I have intended to charge. I have intended to charge it a little differently, although the same thought, and I will read it to you now.

Mr. Miller. If you say it is the same thought, that suits me.

The Court. I would like to read it to both of you.

A person claiming the right of self-defense is not required to retreat if he is in a place where he has a right to be, unless by doing so an affray may be clearly avoided. If he is honestly and reasonably in fear of death or grave bodily harm, he may stand his

necessary.

Mr. Miller. Thank you, Your Honor. Next to the last paper.

The Court. I think that is a correct statement of the law.

Mrs. Stiles. Yes.

(Counsel having returned to the trial table.)

Judge's Charge to the Jury

The Court. Ladies and gentlemen of the jury, the defendant Baxter Griffin is on trial on a charge of murder in the first degree. The indictment is short, simple, and concise, and I will read it to you. The grand jury charges that on or about February 8, 1971, within the District of Columbia, Baxter Griffin feloniously, wilfully, purposely and of his deliberate and premeditated malice shot and murdered Leo Hunter. It now becomes your duty to determine whether the defendant is guilty or not guilty of the offense for which he is being tried.

It is the Government's contention, and the Government has offered evidence tending to show, that on February 8 last the defendant, Baxter Griffin, and the deceased, Leo Hunter, were visiting at the apartment of a mutual friend. Others were present. There was a verbal altercation over some matter that is not material. That Leo Hunter, the deceased, stated to the defendant, "I will knock your teeth out." That the defendant left the apartment. That he returned 5, 10, or 15 minutes later, pulled out a gun and shot Leo Hunter, saying at the same time, "Nobody is going to tell me that he will knock my teeth out."

Before discussing the charge in detail, I am going first to review with you the general principles of law that must govern your deliberations and that must guide you in reaching your conclusions. Many of you, in fact all of you, have had occasion to hear me review some of these principles in other cases. But it is my duty to bring them to your attention in every case and, moreover, it is necessary that you have a fresh recollection of these very important principles that must serve as your guide.

It is the duty of the Court to instruct the jury as to the principles and rules of law that must govern its deliberations. And the jury is bound and obligated to follow the Court's instructions as to the law and to take the law from the Court.

On the other hand, it is the function and duty of the jury to determine the issues of fact. You, ladies and gentlemen of the jury, are the sole judges of the facts, and you must determine the facts for yourselves, solely from the evidence adduced at this trial. The Court will discuss the facts and the evidence, with a view to endeavoring to assist you and to aid you in your deliberations and

of arriving at your conclusions. But if your recollection of the evidence, or any particular [illegible] from the Court's recollection, then your recollection must prevail because the final decision [illegible] or the facts — solely within your domain, and my instructions are binding on you only as to the law.

The fact that a defendant has been indicted and arraigned and is now on trial is not to be taken as an indication of his guilt. The sole purpose of an indictment is to bring a defendant before the Court, because the indictment is the machinery and the procedure that the law has established for placing a defendant on trial.

Every defendant in a criminal case is presumed by law innocent, and this presumption of innocence attaches to him throughout the trial. The burden is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

I repeat, that the burden on the Government is to prove the defendant guilty beyond a reasonable doubt. Beyond a reasonable doubt, I say. Proof beyond a reasonable doubt of course does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to a mathematical or absolute certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourselves, and not just some capricious conjecture or some whimsical speculation.

I often define the phrase "proof beyond a reasonable doubt" in phraseology that seems to me to be very simple, easily understood, and yet absolutely accurate, and the definition is this: Proof beyond a reasonable doubt simply means this:

If, after an impartial comparison and consideration of all the evidence, you can say to yourselves that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. On the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourselves that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conclusion as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established its charges against the defendant beyond a reasonable doubt, you will examine and weigh the testimony of all the witnesses who have testified before you, as well as all the circumstances concerning which testimony has been given. If upon the consideration of the entire evidence there is any reasonable hypothesis or any reasonable theory disclosed by the evidence which is consistent with the defendant's innocence and can be reconciled with his innocence, then the jury must find the defendant not guilty.

In weighing the testimony of the various witnesses who have testified before you, you are the sole judges of their credibility. In other words, you and you alone are to determine whether to believe any witness, in case of a conflict of testimony, such as there was in this case, and the extent to which any witness should be credited.

In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider the manner and the demeanor and the behavior of the witness on the witness stand; the witness' manner and way of testifying; whether the witness impresses you as a truth telling individual; whether the witness impresses you as having an accurate memory and an accurate recollection; and whether the witness has any interest in the outcome of this case. All of these matters, as well as any other factors that appear to you as having a bearing on the question of credibility of witnesses, you may consider and weigh in determining what witnesses to believe and to what extent to credit them.

If you find that any witness willfully testified falsely as to any material fact concerning which the witness could not have possibly been mistaken, you are then at liberty, if you desire to do so, to disregard the entire testimony of such witness or any part of the witness' testimony.

I shall now pass on, ladies and gentlemen, to a consideration of the specific charge against the defendant in detail. As I told you at the opening of my remarks, and as sparse as you have been aware throughout this case, the defendant is charged with murder in the first degree, in fatally shooting Lee Hunter. Murder in the first degree is briefly and succinctly defined in the Code of Laws of the District of Columbia. The definition is simple, as well as brief, and I am going to read it to you as it is in the code:

"Whoever, being of sound memory and discretion, kills another purposely, of deliberate and premeditated malice, is guilty of murder in the first degree."

In order to sustain the charge of murder in the first degree in this case, each of the following four elements must be established beyond a reasonable doubt: *First*, that the defendant killed Lee Hunter; *second*, that the defendant did so with a purpose and intent to kill Lee Hunter; *third*, that the killing was consummated

and accomplished with malice, and, *fourth*, that the killing was unlawful and accomplished with deliberation and premeditation.

Shall we go over each of these four elements and discuss them in some detail. The first element that must be shown in order to establish a charge of murder in the first degree is that the defendant killed Lee Hunter. The fact that the defendant shot Lee Hunter, and that Lee Hunter died as a result of the wound so inflicted, is not denied. So the first element need not trouble you. The defendant admits that he fatally shot Lee Hunter.

The second element that must be shown is that the defendant had a purpose and intent to kill Lee Hunter. Whether he had such a purpose and intent is a question for you, ladies and gentlemen, to determine from the evidence in the case. Of course, there is no way of directly fathoming the operations of the mind of another human being. We cannot tell what goes on in another person's mind, except that we can infer his mental operations from the things that he does and the things that he says, and from the surrounding circumstances. Therefore you have a right to infer purpose and intent to kill from the nature of the act and the surrounding circumstances, if you deem it wise and proper to do so.

The third element that must be established is that the defendant unlawfully and accomplished the killing with malice. Now, what is meant by "malice"? The word "malice" is a legal term. The law does not use the word "malice" in its popular, everyday sense.

Malice, as the law uses that term, does not necessarily mean a malicious or evil or malevolent purpose. It does not mean necessarily a personal hatred or hostility toward the deceased. Malice, in the eyes of the law, is a state of mind. It is a state of mind that discloses a heart fatally bent on mischief, and indifferent to social duty. Malice, as the law knows it, may be defined as a condition of mind that prompts a person to do an injurious act, willfully, to the injury of another. Malice may be expressed, but it may be implied or inferred from the act committed and from the surrounding circumstances.

But there is still a fourth element that must be established in order to justify a conviction of murder in the first degree, and that is that the killing was consummated and accomplished with deliberation and premeditation. Now, what is meant by "deliberation and premeditation"? This must be present in addition to malice and in addition to purpose and intent to kill.

"Deliberation and premeditation" simply means this: After the design or purpose or intent to kill was formed, there must have been some reflection and consideration amounting to deliberation. Some appreciable interval of time must elapse during which there must have occurred some reflection and consideration amounting

malice. If a killing is committed in a sudden heat of passion, caused by adequate and sufficient provocation, the crime becomes manslaughter. In order to reduce murder to manslaughter, however, the passion must have been of such degree as would cause an ordinary man to act on impulse, and without reflection. There must be great provocation, and in addition, to great provocation there must be passion and hot blood caused by that provocation. For example, a blow or other personal violence might constitute adequate provocation; but a trivial insult, or a slight assault, entirely disproportionate to the violence of the retaliation, is not adequate provocation.

If you find that the defendant killed Lee Hunter in a sudden heat of passion, and in hot blood, caused by adequate provocation, and that the killing was without malice, bearing in mind the definition of malice that I have given you, you may then find the defendant guilty of manslaughter.

I have so far discussed the version of this occurrence given by the witnesses produced by the Government. They were all persons who were present in the apartment at the time that the killing took place. The defendant, however, gives us an entirely different version of what occurred. The defendant says that he did not leave the apartment and then return. The defendant says that he remained in the apartment where the killing took place. He says that after there was this verbal altercation, concerning some slight difference between them, the deceased, Lee Hunter, got up, threatened to knock the defendant's teeth out, and later on the defendant added that Lee Hunter made an additional threat and
124 threatened to kill him and that Lee Hunter made a menacing gesture, in that he put his hand to his pocket; and that thereupon, the defendant says, he shot the deceased in self-defense.

It is for you ladies and gentlemen to determine who is telling the truth, whether the witnesses adduced by the Government, the various persons present in the apartment, or the defendant.

In view of the fact that the defendant claims that he shot in self-defense, I want to discuss with you for a few moments the law of self-defense. If the defendant acted in self-defense, as the law recognizes self-defense, and defines self-defense, your verdict should be not guilty. The law recognizes self-defense. Self-defense is a law of necessity. Every human being has a right to defend himself against death, or against serious bodily harm. Preservation is the first law of nature. But in order to justify the use of a firearm or any other dangerous weapon in self-defense, it must appear that the defendant was so circumscribed or so situated that he honestly believed, and he had a reasonable ground for the belief, that he could not save himself from serious bodily harm except by using the

Self-defense from a danger recalls self-defense from a present danger of imminently grave injury to the person which might maim him, which may be permanent in character, or which might produce death.

125 In order to be justified in defending himself by the use of a deadly weapon, it must appear that the defendant honestly believed, and that he had good reason to believe, that he was in imminent peril of his life, or grave bodily harm. And even in self-defense a person may not use any greater force than is reasonably necessary to defend himself. He may resort to the use of a deadly weapon for self-defense only if he is in imminent peril of his life, or in danger of great bodily harm.

At the request of counsel for the defendant, I want to add this further observation on the law of self-defense. A person claiming the right of self-defense is not required to retreat if he is in a place where he has a right to be, unless by doing so an affray may be clearly avoided. If he is honestly and reasonably in fear of death or grave bodily harm, he may stand his ground to the extent even of taking his assailant's life, if it is necessary.

This, ladies and gentlemen, concludes the instructions that I am going to give you. You may find any one of the following four verdicts: Either guilty of murder in the first degree as charged; or, guilty of murder in the second degree; or, guilty of manslaughter; or, not guilty.

I want to remind you again, as I said at the opening of my remarks, that you are the sole judges of the facts; and you must determine the facts for yourselves, solely on the basis of the 126 evidence adduced in this case, uninfluenced by the opinion of anyone else. If my remarks concerning the evidence, or any part of them, do not accord with your recollection of the testimony, then your recollection must prevail.

I want you to take this matter and consider it deliberately and carefully, in the light of the instructions on the law which I have given you, using the same ordinary, commonsense, the same practical intelligence, the same practical approach that you would employ in determining any other important matter that you have occasion to decide in the course of your everyday life.

Are there any objections or requests?

Mr. Miller. May we just come to the bench?

The Court. Yes.

(At the bench:)

Mr. Miller. May I have an exception to that part of Your Honor's charge in which Your Honor told them what you thought

The Court. I stated that that was the testimony of the Government witnesses.

Mr. Miller. Yes. That is all right.

The Court. You may note your exception.

Mr. Miller. Thank you.

(Counsel having returned to the trial table.)

127 The Court. Ladies and gentlemen of the jury, you may now retire. Upon reaching the jury room, please first select a foreman from amongst yourselves, and then proceed with your deliberations.

(Accordingly, at 10:45 a.m., the jury retired to consider of its verdict.)

(Upon return of the jury, at 12:25 p.m. the same day:)

Verdict of the Jury

The Clerk. Mr. Foreman, has the jury agreed upon a verdict?

The Foreman. They have.

The Clerk. What say you as to the defendant, Baxter Griffin?

The Foreman. Guilty in first degree.

The Clerk. Members of the jury, your foreman says you and each of you find the defendant, Baxter Griffin, guilty of first degree murder as indicted, and that is your verdict, so say you each and all? (The jurors responded in the affirmative.)

The Court. Ladies and gentlemen of the jury, the Court wishes to express its gratitude to you for the work you have done on this case and the time and trouble you have taken with it. The Court appreciates the fact that you have borne a very heavy responsibility. You may be excused at this time until 1:45.

128 Mr. Miller. Of course, I will file a motion.

The Court. Yes.

Reporter's Certificate

This record is certified by the undersigned reporter for the District Court of the United States for the District of Columbia to be the official transcript of the proceedings indicated.

THOMAS O'NEAL

128 A

IN THE DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Notice of Motion for a New Trial on the Grounds of Newly Discovered Evidence

Filed May 7, 1948

Take notice that on the affidavit of John M. Holzworth Atty for the defendant verified May 9, 1948 a motion will be made for a new trial on the ground of newly discovered evidence, described and stated in said affidavit, before Hon. Alexander Holtzoff, justice of the above court at 10 A M May 7th 1948

JOHN M HOLZWORTH
Atty for Defendant
324 King St
Alexandria Va.

To GEORGE MORRIS FAY
U S Atty
Asso Counsil

HANS NATHAN *Atty*
1129 Vermont Av N W

129

IN THE DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Affidavit of John M. Holzworth

CITY OF WASHINGTON
District of Columbia, ss:

John M Holzworth being duly sworn says that he is the attorney for Baxter Griffin scheduled for execution in the District Jail on May 14, 1948 for the murder of Lee Hunter.

That within the last week has learned that on the trial of the defendant the trial U. S. assistant Attorney Grace B. Stiles and Sergeant Vogelsang Washington Metropolitan police officer in charge of the investigation of said murder, had in their possession evidence that the deceased Lee Hunter at the time of the killing had an open knife in his hand with which he was attacking
130 or about to attack and assault the said Baxter Griffin. That the said Grace B. Stiles and Sergeant Vogelsang deliberately supressed such vital evidence which would have substantiated the defendants defense of self defense. That deponent received such evidence from an eye witness to the shooting of Lee Hunter, to wit Charles Cornwell at #1345 Corcoran St. N. W. an employee

of the Government Printing office. That deponent has available other witnesses who will substantiate such fact. That neither the defendant nor his attorney could have learned of such fact at the time of trial. That the U. S. attorney supressed other vital evidence of such trial.

JOHN M. HOLZWORTH.

Sworn to before me this 7th day of May 1948.

HARRY M. HULL, Clerk
District Court of the United States
For the District of Columbia.

By James N. Menendez,
Deputy Clerk.

131 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Affidavit of John M. Holzworth

Filed May 10, 1948

DISTRICT OF COLUMBIA
City of Washington, ss:

John M. Holzworth being duly sworn says; that he is the attorney and counsel for the defendant under a written retainer signed by defendant reading as follows

"John M. Holzworth, atty at law. Dear Sir. I hereby retain you as my lawyer in place of Robert Miller and authorize you to take such court proceedings as you may feel proper including petition for a writ of habeas corpus and to sign such petition and to appear also in elemency proceedings.

BAXTER GRIFFIN.

Dated April 30, 1948

That in support of the motion for a new trial on the ground of newly discovered evidence before the court on May 7, 1948 and continued to May 10, deponent states as follows

(1) That in an interview with Charles Cornwell a witness
132 to the shooting and a witness on the trial of defendant and in the presence of Anna Womack, sister of defendant and A. Womack her husband, said Cornwell stated that at the D. C. Morgue he saw a morgue employee turn over to Esther Taylor wife of Lee Hunter, deceased a purse and knife taken from the body of Hunter. That said employee said that the knife was open and in deceased hand when removed from his pocket. That at such place and statement there was also present the undertaker, Mr. Carver

of North Capitol and H Sts N E and also a sister of Lee Hunters. That said Cornwell also stated that playing cards were scattered over the floor at the time of shooting of Lee Hunter.

(2) That at 1 AM, May 9 defendant went to the place of shooting 1718 S St N W with Police officers Luther Miller and Walter Wyatt, who were at scene of shooting within 15 minutes of its occurrence and who stated that playing cards were scattered over the floor. That both stated that they picked up and carried Lee Hunters body to the morgue wagon. That there was also present officer Cor (Preston) Serg W B Vogelsang Det Serg Emerson Brey, Lieut Flaherty Dep Coroner Rosenberger. That they also stated that the morgue employee who removed the body was Joe Small.

That in their presense two nails were inserted thru the 2 bullet holes in the door and that the nails pointed to 2 bullet holes in the opposite wall at a height of about 5½ feet. That they stated that these with one bullet hole in the floor were the only bullet holes in the apartment room.

(3) That defendant interviewed Joe Small at his home on Sunday May 9 and at the morgue that he stated he returned a purse with $1.00 in it to Lee Hunter wife or sister at the morgue; that he found the knife (black handled) in deceaseds pocket and gave it to a member of the Homicide squad.

He also stated that playing cards were scattered over the floor of the room.

(4) That deponent, on May 7 interviewed Sergeant Vogelsang and later Inspector Bryant who stated that a knife was taken from Lee Hunters body.

134 (5) That the photographs taken by the police and in evidence on the trial do not show the scattered playing cards on the floor.

(6) That an examination of the transcript of the trial show that no mention was made of the knife on the deceased or in his hand or of the playing cards found scattered on the floor at time of the shooting.

(7) That defendants testimony was that a card game was in progress when the shooting occurred; that Lee Hunter came at him with his hand in his pocket with drawing something.

(8) That the governments 5 witnesses testified no game was in progress. That Hunter had nothing in his hands.

(9) That the corpner transcript shows that 9 people were present yet only 5 called as witnesses.

(10) That the above information shows that the police photographs were not genuine or true; that the knife was hidden or withheld in the trial; also evidence of cards on the floor; also police testimony showing 6 shots fired was false.

135 (11) That the Trial District Attorney in supressing and withholding

(a) existence of the knife in the pocket of deceased Lee Hunter, in which he had his hand at time of shooting

(b) that playing cards were scattered on the floor

withheld and supressed vital evidence which would have supported his defense of self defense. Also that such supressed evidence would have shown that the governments witnesses testimony of the shooting was false and perjurous.

(12) That the trial District Attorney *stressed* in her summation that the falsity of defendants belief and claim that Lee Hunter had a weapon at hand well knowing he had a knife the existence she deliberately withheld from the court and the jury.

(13) Defendant asks that the foregoing witnesses be subpoenaed and given sworn testimony as above set forth.

JOHN M. HOLZWORTH.

Sworn to before me this 10 day of May 1948

HARRY M. HULL, Clerk
District Court of the United States
for the District of Columbia

By James N. Menendez,
Deputy Clerk

Received copy of this affidavit May 10, 1948

GRACE B. STILES,
Ass't U. S. Atty

136 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Clerk's Memorandum

The Clerk has been advised by counsel for the defendant, Baxter Griffin, that the Official Reporter's Transcript of Proceedings of May 21 and May 25, 1948, as called for in the designation, has already been filed in the United States Court of Appeals.

137 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*,

v.

BAXTER GRIFFIN, *Defendant*.

Criminal No. 246-47.

Order Denying Motion for a New Trial

Filed June 2, 1948

This cause having come on for hearing upon motion for a new trial on the ground of newly discovered evidence, testimony and argument having been presented thereon, and upon consideration of same, it is by the Court this 2d day of June, 1948:

ORDERED, That said motion be and the same hereby is denied.

ALEXANDER HOLTZOFF,
Justice.

140 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Order Directing Clerk to Forward Clerk's Transcript and Exhibits in Original to Court of Appeals

Filed June 11, 1948.

Upon motion of Hans A. Nathan, Esquire, Counsel for Defendant, it is this 11th day of June, 1948:

ORDERED, That the Clerk of the Court be, and he hereby is directed to include the Clerk's certified copy of the Court Reporter's stenographic transcript of the proceedings had herein on or about the 18th day of April, 1947, to wit, the minutes of the original trial as well as the original exhibits filed and introduced at the hearing for a Motion for a new trial on grounds of newly discovered evidence on the 21st and 25th day of May, 1948, in the Record for forwarding to the U. S. Court of Appeals for the District of Columbia.

ALEXANDER HOLTZOFF,
Justice.

141 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Stipulation Designating Record

Filed June 14, 1948

It is hereby stipulated by and between the parties that the defendant hereby withdraws the designation of record filed herein on June 10, 1948, and the parties, by agreement, designate the following portions of the record to be included in the record on appeal.

1. Notice of Motion for a new trial returnable May 7, 1948.

2. Affidavits of John M. Holzworth, Attorney, verified May 8 and May 10, respectively, in support of such motion.

3. Transcript of hearings on May 21 and May 25, 1948.

4. Six photographs and a knife introduced in evidence on such hearings.

5. Order denying motion for a new trial dated May 25, 1948.

6. Transcript of proceedings of trial.

7. Notice of Appeal from the Order denying Motion.

8. Affidavit in support of application to proceed in forma pauperis.

9. Order granting leave to proceed in forma pauperis.

142 10. Order directing clerk to forward clerk's transcript, etc.

11. This stipulation of record.

GEORGE MORRIS FAY,
United States Attorney.

SIDNEY S. SACHS,
Assistant United States Attorney.

HANS Q. NATHAN.

143 Clerk's Certificate to foregoing transcript omitted in printing.

146 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Criminal Division No. 2

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

BAXTER GRIFFIN, *Defendant*.

Criminal Action No. 246-47.

Reporter's Transcript of Proceedings on Motion for New Trial

Washington, D. C.,

Friday, May 21, 1940.

The above-entitled matter came on for hearing on a motion for a new trial on newly-discovered evidence, before the HON. ALEXANDER HOLTZOFF, Associate Justice, at 10:20 a. m.

APPEARANCES:

On behalf of the United States:
MRS. GRACE B. STILES, Assistant United States Attorney.

On behalf of the Defendant
GEORGE E. C. HAYES, Esq.

148 PROCEEDINGS

The Clerk: United States versus Baxter Griffin, Criminal No. 246-47.

The Court: You may proceed, Mr. Hayes.

Argument on Motion for a New Trial on Newly Discovered Evidence on Behalf of the Defendant

By

GEORGE E. C. HAYES

Mr. Hayes: If Your Honor please, as Your Honor will know in this matter I approach it with the difficulty of not having participated in this trial. Your Honor will know that I was appointed by Your Honor to argue this motion.

The Court: The Court appointed you for the purpose of this motion in view of the fact that the defendant has discharged the counsel who represented him at the trial and on appeal, so the Court felt that the Court should appoint another counsel. The Court appreciates your accepting the assignment.

Mr. Hayes: I turn, if your Honor please, to the transcript of the record in order that I might acquaint myself with the testimony that has been adduced and also read the motion which has been filed by Mr. Hollzworth which is this motion for a new trial.

This was a first-degree murder case and, unquestionably, one of the issues, was as to whether or not there was a deliberate,
149 premeditated malice which would be the basis for a first-degree verdict. It appears from the transcript that one of the issues that was definitely raised was as to whether or not there was a card game that was going on at the time or just prior to the commission of the alleged offense.

On behalf of the Government, testimony was given tending to show that the party was over with, and that the defendant, Griffin, had left the place and was gone for some five, ten or fifteen minutes, after which he came back and, making some comment with respect to a statement that had been made to him to the effect that the deceased person was going to knock his teeth down his throat, he came in and said there wasn't anybody who was going to say anything like that to him and began shooting.

The motion for the new trial is supported by an affidavit which says that at the time, when the offense was committed or within a relatively short time thereafter—within fifteen or twenty minutes—that police officers came to the place and pictures were taken. The transcript, unfortunately, did not disclose anything with respect to the detail as to that because counsel representing the defendant apparently conceded or between counsel and the Government it was conceded, that these pictures should be offered in evidence and, therefore, as to the surrounding details the transcript is silent. However, this affidavit says that when the officers
150 came to the place cards were strewn over the floor and that any picture that was taken at that time should have revealed that condition. The picture apparently did not reveal that condition and so the motion is made indicating that that situation was either corrected by someone picking up the cards or that the pictures were taken in such wise as not to reveal that circumstance and that had that circumstance been revealed it would have tended to support the contention made by the defendant to the effect that this argument came over a card game.

The Court: I thought there was no dispute over that; that the argument did start in the course of a card game.

Mr. Hayes: Let me say to Your Honor, as I conceive what the transcript shows, on behalf of the Government there were two versions as to what had occurred that occasioned the defendant feeling apparently as he did which resulted in the shooting. One was the deceased person had a child who lived, as I remember, upstairs, and that this child came down in the room where they

were and that the defendant attempted to fondle or do something with the child, and the man said, "Let the child alone." He said, "Well, if you don't like it, I will take your wife and your child around to my house."

The man said "If you do I will knock your teeth down your throat," and that witness indicated that thereafter he sat for a while and then he left, then came back and, as I say, when he came back, he began shooting, saying that no one was going to
151 make that statement to him.

The other version was that there was the card game going on and that, as far as the defendant was concerned, the argument arose over the question of a card game.

The Court: My recollection of the evidence is that it is not disputed that there was a card game, but the dispute was whether the argument arose over the card game or over the defendant's fondling the baby of the deceased. The fact that card game was in progress, I think, is not disputed.

Mr. Hayes: But the pertinent point, as I see it, is, Your Honor, that if, as a matter of fact the card game was in progress that would support the theory advanced by the defendant. The Government's theory was that the card game, having at one time gone on as to which there was no dispute, the card game was over; that this man came in after it was over and that then the shooting began; and so I say if the evidence were there tending to show that, as a part of what at that time happened, the cards were strewn across the floor, it would seem to me to have tended to support the point of view as urged by the defendant.

The defendant claimed that what happened was they were playing a game called Black Jack. Another thing to be remembered with respect to the original evidence was that other people said they were playing Whist. The defendant said they were playing Black Jack and he had made a bank in the Black Jack game; there had been two intervening bets and somebody called
152 for a bet of a dollar. The bank was $8 and that person who was the deceased person reached over and took the entire bank and he said, "You can't do that. There have been intervening bets and you didn't stop the bank. If you did, there would still be the two bets and, therefore, you are not entitled to take the bank."

The man said he was going to take it and got up and made some statement about knocking his teeth down his throat and the defendant claims started around the table from the other side where he was with his hand in his pocket in a threatening and menacing manner and it was then that he shot him. It would seem to me, with regard to the cards strewn on the floor that it would tend to support that version of the case as offered by the

defendant, that this card game was in progress; that the strewing of the cards was a result of the argument that occurred at that time when he started around the table after him and that by so much the failure to be in a position to offer that evidence was to the defendant's detriment.

It is also argued, as part of the motion for a new trial, that the Coroner, that is, at the Morgue it was developed that when the man came to the room to take the picture that the deceased at that time had his hand in his pocket. I think that was sufficiently in the evidence.

The Court: Yes. Mr. Miller, who represented the defendant, offered, in evidence a photograph showing that the de-
153 ceased had his hand in his trousers pocket. The inference would be that that was a menacing gesture on the part of the deceased toward the defendant, so that was in evidence and the jury could consider that.

Mr. Hayes: That admittedly was in evidence, but I say, if Your Honor please, there is pertinence to the fact that what is now claimed as being something that was not properly brought to the jury's attention was that it developed that not only did he have his hand in his pocket, but according to the affidavits that are part of the record, he had in his hands an open knife, a black-handled knife referred to in the affidavit, and that that statement was made by Mr. Small who was an attendant at the Morgue; that he turned that knife over to the Government.

The Court: The defendant testified in his own behalf at the trial. The defendant did not claim he saw a knife in the hand of the deceased. He claimed that the deceased had his hand in his pocket and that was corroborated by the photograph because the hand was in the right-hand trousers pocket.

Mr. Hayes: Yes; but, if Your Honor please, there was a sharp question of fact as to whether or not—and a fundamental question of fact as to whether or not this man had left the place, had gone home or somewhere else because the testimony simply says he left the place and came back in ten or fifteen minutes. I say again, if Your Honor please, if, as a matter of fact, the testimony had been offered tending to show that this man had his hand in
154 his pocket but had his hand in his pocket on an open knife, that would have tended as I conceive it to support the defendant's theory that it didn't happen in the way the Government witnesses testified, but rather the man had come there after him in this threatening manner, starting around the table, because if the Government's theory were true there would have been no conceivable reason why the deceased person would have been standing over by the window as they claimed he was.

This man came in and started shooting. There would have been no reason for him standing there fifteen minutes after this man left, with an open knife in his pocket.

Aside from the testimony that he had his hand in his pocket, which admittedly was a part of the testimony that, as a matter of fact, he did have an open knife in his pocket, had the jury had the advantage of that information it would have tended to support the theory of this defendant that he was at that time set upon by this deceased person and it was not a situation where he had gone off, come back ten or fifteen minutes thereafter and the time for deliberation would tend to make it a first-degree murder case.

Your Honor knows that under the rules Your Honor has the widest type of discretion in granting a motion for a new trial. I know the extent to which this matter had gone. I know there has been the trial; the appeal; the affirming; the denial of certiorari and the person now stands waiting the decision as
155 as to whether there may be executive clemency; but the rule provides, as Your Honor knows, within a two-year period a motion for a new trial may be granted and the decisions very definitely support there may be the widest sort of discretion in the exercising of Your Honor's discretion as to whether or not a new trial should be granted.

The test by which the new trial should be allowed the language seems to me—and I am taking this from American Jurisprudence: "It is often said in a criminal prosecution to obtain a new trial on the ground of newly-discovered evidence, such new evidence must be of such a character as, on being considered with all the rest of the testimony—" and this is the part that I respectfully ask Your Honor to address your attention to—"to leave a reasonable doubt as to the defendant's guilt or at least as to his guilt in the degree of probability with which the jury finds him guilty."

I say there, if Your Honor pleases, that the very suggestion that is there had, that if, as a matter of fact, this testimony were in, if Your Honor feels that this testimony might have tended to raise a reasonable doubt in the mind of any one of those jurors as to this man's guilt or as to the range within which they found him guilty, whereas here we have a first-degree murder and there is a possibility of second-degree or manslaughter; that if Your Honor feels that that testimony had been offered there would have been the possibility of raising a reasonable doubt in
156 the minds of any one of those jurors, then it would be Your Honor's duty to grant a new trial, and I respectfully suggest to Your Honor that had they had before them this picture of the strewn cards, which was not a part of the testimony, the

picture of the man not only with his hand in his pocket which was part of the testimony, but with an open knife, that it would have tended to support the theory of this defendant, and I don't pretend, because I don't think it fair that I should, that the defendant claimed anything other than what Your Honor said. He didn't claim that he saw anything in [illegible] hand. He claimed that he saw him coming toward him with his hand in his pocket and Your Honor well knows that the law does not require that he wait to see what it is. If he, honestly believed at that time he was in danger of death or serious bodily harm he had the right to defend himself even to the extent of taking life, and to support that theory there was that danger, it seems to me important, that there was this open knife and that I take it to mean the uncontradicted evidence is available to show this particular circumstance.

It seems to me, as I have said to Your Honor, with respect to Your Honor's discretion in this matter and I urge it because of the importance in a matter of this kind with a question of the life of a human being at stake, under our Federal rules, in one of the Annotated cases the trial court has broad discretion as to whether or not a new trial should be granted because of newly-
157 discovered evidence, and, under the rule itself, the Court may grant a new trial to the defendant if required in the interest of justice. If the trial was by the Court, without a jury, the Court may vacate the judgment entered, take additional testimony and direct a new trial based on the ground of newly-discovered evidence before or within two years of final judgment. If an appeal is granted, the Court may grant it only on a remand of that case. The language further along is not important as far as this case is concerned.

In *Arbuckle* vs. *U. S.*, 79 Appeals, the language of that case also tends to support that wherever there is evidence suggested as the basis for a new trial and it would tend to support the theory advanced on behalf of one of the parties so as to have participated in the deliberation by a jury tending to pass upon the vital suggestion as to whether or not there might be a reasonable doubt created by the offer of that new evidence or where, as I have indicated to Your Honor before, it might change them from a first-degree to a second-degree or manslaughter by reason of this additional testimony, that, then Your Honor should grant a new trial.

I respectfully suggest, Your Honor, that under the circumstances and with the possibility of this offer that has been made and supported by affidavit, that Your Honor should grant that new trial.

The Court: Before you sit down, Mr. Hayes, I want to
158 get your views on this aspect of the matter:

Admittedly, this open knife was in the pocket of the deceased and was not visible and the defendant did not know as a fact that the deceased had an open knife in his pocket. All that the defendant saw was what he said he deemed to be a menacing gesture, namely, that the deceased placed his hand in his trousers pocket and this evidence was before the jury. The Court is wondering whether the evidence that the deceased had an open knife in his pocket would be admissable, because the open knife was not visible to anybody. It was inside the pocket. No one knew, and the defendant did not know, that the deceased had an open knife.

Mr. Hayes: Your Honor, I don't urge it on the theory that it would have changed that version of the case that he, the decedent, did not know and that had he known it possibly would have made no difference because he did what he did believing simply that it was—of course, if it had been seen it would have made no difference in the answer, but I think it definitely important for this reason:

The Government witnesses indicated that this remark having been made, the man sat there and played for a little while. He left and said, "I am going to get some Pepsi-Cola." He came back in ten or fifteen minutes and then began shooting. I think it important, therefore, to support the theory of his case that this man started around the table after him, which was this
159 defendant's point of view, and that if the knife were open in his pocket, that it would have tended to support his theory that this is what the man did because he probably would not have gone around the table after him with a closed knife in his pocket, and so that fact that the knife was open in his pocket would not have changed the question as to whether or not it meant anything from the defendant's point of view as to whether or not the menace was there, but it would definitely have tended to support this man's theory that the deceased had started around the table after him and it was then when the shooting occurred because, as I said to Your Honor, if he simply had a closed knife in his hand and with his hand in his pocket standing at the window, that might have been one thing; but there certainly would have been no reason, if this man left, as the Government witnesses indicated that he did, without there being any indication that there was anything wrong; that he accepted the statement and he left apparently in good spirits. He then came back in fifteen minutes and started firing. That was the Government's point of view.

The defendant said it did not happen in that wise. That, on the contrary, "this man started around the table after me and I fired because I feared what might happen to me."

It does seem to be definitely in support of that theory and if the jury had known that he did have a knife in his pocket, they might have had a reasonable doubt in their minds as to the
160 truthfulness of the Government witnesses who claimed nothing had happened; that he left without a quarrel and he came back and started shooting; because if that were true there would have been no reason for him standing with an open knife, in his pocket.

It seems to me it is important so far as that version of the case is concerned and, if that be, as I said, Your Honor—and I think it definitely is—if that testimony had been offered, it would have engendered in the mind of some one of those jurors a reasonable doubt as to whether or not what the Government witnesses said as against what this defendant said, then Your Honor comes within the purview of the rule which says under those circumstances Your Honor should grant a new trial.

Mrs. Stiles: Your Honor, there are a couple of points that I understood counsel at first to say that I would like to comment on. He stated that the deceased had an open knife in his hand, in his pocket. The information I have was it was in his pocket, but not in his hand.

I have the Sergeant here today who handled this investigation of this case and it is my recollection and he informed me that while this open knife was in the deceased's pocket, that the deceased had in his hand a deck of cards.

The Court: Is the Sergeant here?

Mrs. Stiles: Yes, sir.

There is one other point that I wanted to make. Also it
161 was my understanding from the Sergeant that these cards counsel claimed were strewn over the floor fell out on the floor when they took this man's hand out of his pocket after they had taken the picture with the hand in the pocket. I may be wrong about that.

The Court: You may put the Sergeant on the stand. I don't recall the testimony.

Mrs. Stiles: And may I say one other thing? Counsel says Government witnesses said the argument started while they were playing cards. It is my recollection the Government witnesses said the game was entirely over.

The Court: The defendant's version is otherwise.

Mrs. Stiles: Yes. I thought he said the Government witnesses said it was not while they were playing cards.

Mr. Hayes: No; it was just contrary. The Government witnesses said it was not while they were playing cards, and that is why I thought it was important to show the cards were strewn on the floor.

Mrs. Stiles: Sergeant Vogelsang.

Thereupon, WALTER B. VOGELSANG called as a witness on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. Stiles:

Q. State your name for the record. A. Walter B. Vogelsang.

Q. You are attached to the Homicide Squad of the Metropolitan Police Department, are you not, Sergeant? A. That is correct.

Q. Did you investigate this case of United States versus Baxter Griffin? A. I did.

Q. Did you testify in this case at the trial? A. I did.

Q. Sergeant, were you present when the pictures in this case were taken? A. I was.

Q. Were you present at the time that Officers Miller and Wyatt, I believe, were at the scene? A. I recall Miller being there. Wyatt was there, too, yes.

Q. Officer, will you tell us what the condition of the surroundings there were when you arrived? A. In what respect is that, Mrs. Stiles?

Q. I mean where the deceased was and the condition of the room, and so forth. A. Well, the deceased was lying over toward
163 the south wall of the room on his back, and his head was back between a chest and what appeared to be a table. There were some articles laying on his body that had dropped from this table, apparently, when he fell.

Mr. Hayes: I didn't hear what you said.

By Mrs. Stiles:

Q. Will you speak louder, Sergeant? A. I said there was some articles laying on his body that apparently fell from the table.

Mr. Hayes: Of course, if Your Honor please, I think he might testify that there were articles here. He stated apparently the articles fell from the table.

The Court: There were articles on his body.

The Witness: There were articles on his body. Between his body and the door, there was a card table and several chairs. There was no evidence of any cards on the table or on the floor.

By Mrs. Stiles:

Q. Where was his hand when you arrived? A. His right hand was in his right-hand pants pocket.

Q. Was this hand taken out of his pocket while you were there, Sergeant? A. It was.

Q. What, if anything, was in his hand and in his pocket? A. His hand was clasped around a deck of cards and when his hand was removed from the pocket, the cards stayed in his
164 hand.

Q. What, if anything, was in his pocket—anything else? A. There was a small black pen-knife that had originally been a two-bladed knife. One blade was broken off and that part of the blade was closed. The other blade was open.

Q. Was this knife in his hand? A. It was not. It was in his pocket.

Q. Did you see any cards strewn over the floor? A. There were no cards on the floor until after the deceased's hand was removed from his pocket. At that time, some of the cards fell to the floor alongside his body.

The Court: How soon did this occurrence happen, after you arrived at the premises?

The Witness: I would say within about ten minutes, Your Honor.

The Court: Mr. Hayes?

Cross Examination.

Q. Did Mr. Miller and Mr. Wyatt get there before or after you? A. They were there before.

Q. And you said that there was at no time any showing of cards strewn on the floor? A. That is correct.

Q. I thought that you first said when you took his hand
165 out of his pocket the cards remained in the hand. A. That is right.

Q. I thought that you subsequently said the cards didn't remain in his hand, and they fell to the floor. A. When they were moving the hand around a few of the cards fell to the floor.

Q. Did you pick them up? A. No. I did not.

Q. Anybody pick them up? A. I couldn't answer that.

Q. When you took the picture, what was the situation then? Were the cards on the floor, that had fallen from his hand? A. In one of the pictures, it showed a few cards on the floor.

Q. You state that there were no cards on the table? A. That is correct.

Q. And that it isn't a fact that the cards were scattered? A. That is correct.

Q. Did you turn this knife over to the prosecution at the time this case was heard? A. I brought it to the attention of the prosecution.

Q. And the fact that there was the open knife? A. That is correct.

166 Q. Did you examine also the walls in the place with respect to bullet holes? A. Yes, sir, I did.

Q. How many bullet holes did you find, sir? A. I found two bullet holes in the south wall of the room, and one in the floor just inside the door.

Q. Were there any other bullets or signs of bullets except the ones that were in the body of the deceased? A. You mean outside of these other holes?

Q. Yes. A. There were two holes in the wall; one in the floor, and whatever were taken out of the body of the deceased.

Q. Now, you know as a matter of fact, or do you know that the defendant testified that he fired only three times? A. I don't know that, no, sir.

Q. Isn't it a fact or do you know that the contention of the Government was that there were five shots fired? A. I don't know that, sir.

Q. Did you testify before that there were two holes through the door? A. That is correct; yes, sir.

Q. You mean that there were two through the door, two in the wall—is that—— A. (Interposing) I overlooked that. There was two in the wall; two in the door, and the one inside the

167 door through the floor.

Q. And one through the man? A. Yes, sir.

Q. So that would be five shots? A. No, sir; not necessarily.

Q. Maybe I don't follow you. A. The two in the wall were on the south side of the room which was opposite the door.

Q. You mean the two in the wall might have been the ones shot through the door? A. That is correct; yes, sir.

Q. Did you find the gun that was used? A. No, sir, I did not.

Q. Did you find any unexploded shells at the home of this defendant? A. No, sir. I did not.

Q. Did you find any exploded ones? A. No, sir.

Q. Were you present when the search was made of his home? A. No, sir, I was not.

Q. So you don't know whether or not there were any exploded shells that were found? A. No, sir.

Q. Do you know who made that exploration? A. I imagine it would be the arresting officer, but I don't know

168 myself.

Mr. Hayes: That is all, sir.

(The witness was excused.)

Mr. Hayes: If Your Honor please, if that is all Mrs. Stiles has to offer, I would like to suggest that it would seem to me that the very testimony of the Sergeant this morning makes it all the more

important that Your Honor should grant a new trial if what the affidavit says be true, because these people, according to the affidavit—that is, both Miller and Wyatt—stated when they got there the cards were strewn on the table and they were strewn on the floor, according to the affidavit; so if that be true, what Sergeant Vogelsang has testified would put the fact in issue. Sergeant Vogelsang says it isn't a fact; that when he got there the man was there, his hand was in the pocket, and when his hand was taken out the cards were strewn on the floor. That is directly contrary to what the affidavit says as to newly-discovered evidence, and I think that puts in issue what Officer Vogelsang says and what Officers Miller and Wyatt say was the condition of the floor, and that is a factual situation which the Jury ought to pass on.

The Court: Anything further, Mrs. Stiles?

Mrs. Stiles: I would like to ask if this is supposed to be an affidavit of Miller and Wyatt? I did not subpoena them. I subpoenaed the officer in charge of the case and if these officers have testimony that is contrary to it, it seems to me they
169 should have been brought here; but I don't see their signatures on this affidavit anywhere.

The Court: They didn't present any affidavit.

Mr. Hayes: No, if Your Honor please, but the affidavit that is presented says that this testimony was gotten from these individuals.

Your Honor, if that be the point that is being raised, then I would ask Your Honor's permission to have the matter continued to give us an opportunity to produce these witnesses, because I found in the record this was an uncontradicted statement.

The Court: To contradict what allegation in the affidavit?

Mr. Hayes: The allegation that Miller and Wyatt had stated they had found cards strewn on the floor. There was nothing in the record that in any wise attempted to dispute that fact and I gather now that it is admitted that the man did have an open knife in his pocket. It is admitted that he had turned that open knife over to the prosecution and the prosecution at the time of trial knew there was an open knife, but there is not one line of testimony in this case to that effect.

Mrs. Stiles: I would like to state that the prosecution did know there was an open knife in the pocket of the deceased, but I took the position that there was no evidence in the case that this knife was ever taken from his pocket. Even by the defendant's own testimony, he testified the deceased came around the
170 table toward him with his hand in his pocket. The defense put in evidence the photograph which the Government would

not have been allowed to put in because it showed the deceased lying bloody on the floor. Your Honor said you would not have allowed the Government to put it in because it would have inflamed the jury. The defense attorney himself put it in and showed this deceased with his hand in his pocket.

I felt, just as Your Honor pointed out a while ago, if this fact of the knife had been raised it would not have been admissable. The man could have had a dozen knives in his pocket and unless it was shown that the defendant saw this knife or he was drawing out a knife or had a knife in his hand, that it would not have been admissible. That is the position I took. Certainly it was with no intention of suppressing any evidence which I felt was admissable.

Mr. Hayes: Mrs. Stiles, I am satisfied, had a version of her own that justified her in not producing it. However, if there be correctness in what I urge upon Your Honor, that the question of an open knife in his pocket might have tended to indicate if happened as the Government witnesses said or as the defendant said, I frankly can't see how that can be avoided.

I don't want to continue to repeat myself but it seems to me the difference between whether or not a man is standing in front of a window for 15 minutes when nothing has happened as against the defendant's version, I know if I were a juror it would
171 weigh with me which one of those conditions was the correct one.

I started to say of course this is a matter of grave importance and that if Your Honor feels the statement needs corroboration by the witnesses themselves, I would ask Your Honor's leave to be given opportunity to produce these witnesses.

The Court: The Court feels that Officers Miller and Wyatt should be produced. Could you have them here 1:45?

Mr. Hayes: May I report to Your Honor my situation? I excused myself to come before Your Honor. There is a will contest on before Mr. Justice Bailey in which I presumably am trial counsel.

I saw Mr. Ransome come down and I imagine he was coming down for me to report to Mr. Justice Bailey.

I will do whatever Your Honor advises but I wanted Your Honor to know of my situation.

The Court: I would like to dispose of the matter this afternoon. However, if Justice Bailey prefers that you go on with your case this afternoon, I will continue it to Monday morning. You see, this is an urgent matter. I don't think it would take very long.

Mr. Hayes: I would appreciate it if it could go over to Monday for this reason, additionally:

I understand from Mr. Holzworth, who made the investi-
172 gation, there is also evidence produced by the Coroner to the effect that the man did not have a deck of cards in his pocket, but there were one of two cards in his pocket which, in the light of the evidence adduced this morning, might be significant.

The Court: Will Monday morning be convenient?

Mrs. Stiles: I have cases scheduled but this would take precedence.

The Court: I want to make sure that Officers Miller and Wyatt will be present, because the only reason I am continuing this is to have them here.

Mrs. Stiles: Sergeant Vogelsang assures me they will be present unless they are on leave and out of the city. Of course, if they are on leave in the city they will be here.

The Court: Can they be called in if they are on leave out of the city? I dislike to inconvenience officers, but this is a rather important matter.

I will have to cross that bridge later. They may not be out of town.

I will continue this matter until 10 o'clock on Monday morning.

Mr. Holzworth: Your Honor, may I say this: That the defendant asked counsel whom you appointed and who has done an excellent case, to have me associated with him in this case? There
173 is considerable other testimony and other witnesses which I have gotten within the last several days which I think counsel, after I tell him the purport of it, will want to call those witnesses.

The Court: I will hear any witnesses that counsel choose to produce on Monday morning.

Mr. Hayes: Thank you, Your Honor.

(Thereupon, at 11 o'clock a. m., an adjournment was taken until Monday, May 24, 1948, at 10 o'clock a. m.)

Certificate of Official Reporter

I, JEANNETTE RAWLS, an official court reporter of the District Court of the United States for the District of Columbia, hereby certify that the foregoing pages 1 to 27 are a true, accurate and complete transcript of the testimony and the proceedings had on motion for a new trial on newly discovered evidence in Criminal Action No. 246-47, *United States* vs. *Baxter Griffin*, on May 21, 1948.

/s/ JEANNETTE RAWLS,
Official Court Reporter.

175 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Criminal Division No. 2

UNITED STATES OF AMERICA

v.

BAXTER GRIFFIN, *Defendant.*

Criminal Action No. 246-47.

Tuesday, May 25, 1948
Washington, D. C.

The above-entitled matter came on for further hearing on a motion for a new trial on newly-discovered evidence, before the HON. ALEXANDER HOLTZOFF, Associate Justice, at 10:20 a. m.

APPEARANCES:

On behalf of the United States:
MRS. GRACE B. STILES, Assistant United States Attorney.

On behalf of the Defendant:
GEORGE E. C. HAYES, Esq.

176-177 PROCEEDINGS

The Clerk: Criminal Action 246-47, United States versus Baxter Griffin.

The Court: We continued this case last Friday, in order to enable you to summon two police officers. Are the police officers present?

Mrs. Stiles: Yes, Your Honor.

First, if Your Honor please, may I put Sergeant Vogelsang back on the witness stand?

Mr. Hayes: Might it be well to have a rule, if Your Honor please.

The Clerk: All witnesses in the case of the United States versus Baxter Griffin who will testify in this hearing are asked to step outside, please.

Thereupon WALTER B. VOGELSANG recalled as a witness on behalf of the Government, having been previously sworn, was examined further and testified as follows:

Direct examination by Mrs. Stiles:

Question. Sergeant Vogelsang, last Friday, I don't recall whether you told us when you arrived on the scene, whether the officers Wyatt and Miller were there, or whether they arrived after you, if

you know. Answer: Mr. Hayes asked me that question and I believe I told Mr. Hayes that Wyatt and Miller were there when I arrived.

178 The Court: I did not get your answer.

The Witness: I believe I told Mr. Hayes that Wyatt and Miller were there when I arrived. I since looked up my notes on that and I have found out that is not correct.

I arrived on the scene about 7:45 and Officers Wyatt and Miller did not arrive there until about 8:00 o'clock or shortly after 8:00.

By Mrs. Stiles:

Q. What if any other officers arrived there before you did, if you know? A. Cox and Denny were present when we arrived.

The Court: Are they here?

Mrs. Stiles: Officer Cox is here.

The Witness: They are both here.

The Court: The Court particularly wants the officers who arrived on the scene prior to this witness.

Mrs. Stiles: I am trying to get them all here.

By Mrs. Stiles:

Q. That is Officer Cox and Denny who were there when you arrived? A. That is correct.

Q. And Officer Wyatt and Miller arrived after you got there? A. About fifteen minutes later.

Q. Were any other officers there and if so will you tell us
179 when they arrived, if you recall? A. The next officer who arrived, I believe, was the photographer, the man who took the pictures.

Q. Is he here today? A. He is here, yes.

Q. Is that Detective Sergeant Embrey; is he here? A. He came there with me and he is here today, too, yes.

Q. Now Sergeant, did you bring here with you today the knife in this case? A. Yes, I did.

Q. Have you it with you now? A. I do.

Q. Will you show it to the Court and to counsel for the Defense?

The Court: Which blade was open?

The Witness: This blade is broken, Your Honor, and this blade was open.

The Court: I suggest you offer this knife in evidence.

Mr. Hayes: I have no objection, Your Honor.

Mrs. Stiles: I offer it in evidence.

The Court: It may be admitted.

180 By Mrs. Stiles:

Q. Sergeant, did you bring with you the photographs taken by this photographer whom you say is here today? A. Yes.

Q. Are these the exact copies offered in evidence at the trial? A. No. These are not the copies offered in evidence; this is a duplicate set.

Mrs. Stiles: May I explain to the Court that these copies offered in evidence after the trial, the record shows went to the Supreme Court along with the record at the time the appeal went up, and knowing it would take an order of the Court to get those, I have asked the officer to bring a duplicate set and they can be identified by reference to the record because the record describes the different photographs.

The Court: I suggest you have them marked. I do not think the time should be taken to prove these. They were proved once.

Mrs. Stiles: I will testify they were the ones we put in evidence, myself.

The Court: I propose that the exhibits be marked.

Mrs. Stiles: I will say that this is Government Exhibit Number 1.

The Court: I do not think we need to go into those details.

181 Just have the clerk mark them with the same numbers as the other set. I only want to consider so-called new evidence.

Mrs. Stiles: I just thought I would bring in these so there would be no question about them, Your Honor.

This is Government Exhibit No. 2. I think that is either 2 or 3. Two and Three I may have crossed up, there. Now these are Defense Exhibits, Mr. Clerk, Numbers 1, 2 and 3.

The Court: Is there anything further from this witness?

Mrs. Stiles: I have nothing further.

The Court: Have you any further cross examination, Mr. Hayes?

Mr. Hayes: Yes, Your Honor.

Cross examination by Mr. Hayes:

Q. Sergeant, did I understand you to say, sir, that after you came and, before any of the other officers—Officers Miller, Wyatt, Cox or Denny—before any of them came, the photographer came? A. No, sir.

Q. I thought you said the photographer was the next police officer who came. A. I meant after Wyatt and Miller.

Q. The order was yourself and Sergeant Embrey? A. First at the scene was Denny and Cox; then Sergeant Embrey and myself.

182 Q. All right, sir. And then the photographer? A. Then Miller and Wyatt and then the Photographer.

Q. So the photographer was the last one there? A. I am pretty sure that is correct.

Q. Do you remember Deputy Coroner Rosenberg coming? A. Yes, sir, I do.

Q. When did he arrive in the order which you have named? A. It is pretty hard to remember, Mr. Hayes, but it is my recollection that he came there shortly after 8:00 o'clock and Wyatt and Miller came around the same time. I cannot say whether the two latter came just before or after Rosenberg, but it was around the same time.

Q. Were these photographs all the photographs taken? A. Yes, sir, six photographs.

Q. That was all that were taken? A. Yes, sir.

Q. Had anything been moved in the room at that time, when the photographs were taken? A. Not at the time, from the time of my arrival, no, sir.

Q. About the cards, were there any cards there at the time when you arrived?

The Court: I think you were over that the other day. This witness testified there were no cards on the floor when he ar-
183 rived; but some cards fell out of the pocket of the deceased.

By Mr. Hayes:

Q. When the pictures were taken, was it before the hand of the deceased was removed from his pocket, or after? A. The first picture was taken with the hand of the deceased in his pocket.

Q. How about the second one? A. The second was taken after his hand was removed and was supposed to have shown the hand with the cards in it, but the photographer failed to catch that.

Mr. Hayes: May I hand you that one, sir. That is the one I presume to which you refer, that does not show. I am referring to the picture I just handed the Court. I do not know the number.

The Witness: That was the third. There was another one, there.

The Court: There is no doubt about the fact, Mr. Hayes, that one picture shows the body of the deceased with his hand in his pocket, and that particular photograph was offered by Defense Counsel in evidence.

Mr. Hayes: The one that also has importance, if Your Honor please, as I see it, is a picture that would have shown the question of the cards. I think the cards come to be an important element in the argument for a motion for a new trial. It was for
184 that reason that I was calling attention to the fact that the photographs that were offered, none of them, according to Sergeant Vogelsang showed that condition.

The Court: The photographs speak for themselves. They show no cards on the floor. None of them show cards on the floor.

Mr. Hayes: I wanted you to see the way this picture is cut off. It did not exactly show that situation at all.

The Court: The photographs speak for themselves.

By Mr. Hayes:

Q. There is one you wanted to make reference to. A. This is the second one I referred to. It should have shown the hand. It does not show it.

The Court: What is the Exhibit Number on that photograph? I want the record to show that photograph the witness refers to.

The Witness: It is Defendant's Exhibit Number 2.

Now the third photograph taken does show some of the cards in evidence.

The Court: May I see the photograph.

Mr. Hayes: Yes, Your Honor.

The Court: This is Defendant's Exhibit Number 3?

Mrs. Stiles: Your Honor, that is either 2 or 3. I do not have the record with me.

The Court: This photograph shows cards on the floor.

Mr. Hayes: I have no further questions.

185 Mrs. Stiles: Your Honor at this time, I think both Mr. Hayes and I subpoenaed Coroner Rosenberg. May he be heard at this time?

The Court: Certainly.

Whereupon, DR. RICHARD M. ROSENBERG was called as a witness and having been first duly sworn, testified as follows:

Direct examination by Mrs. Stiles:

Q. Will you give your full name for the record. A. Richard M. Rosenberg.

Q. You are Deputy Coroner of the District of Columbia? A. I am.

Q. Did you testify in this case at the trial? A. I believe I did.

Q. May I ask, were you at the scene of this shooting? A. I was.

Q. Do you recall about what time you arrived, Doctor? A. No, I do not. It was night. I received a call, promptly went to the scene, where I did what I was supposed to do.

Q. Do you recall who was there when you arrived? A. No, I do not.

Q. Do you recall whether Sergeant Vogelsang was there?

186 A. Yes, I believe he was.

Q. Were there a number of officers there? A. Yes, there was a large number.

Q. When you arrived, where was the body of the deceased? A. It was lying on the floor. It is a front room, the first floor, the windows face East, and he was lying parallel on the floor, to the windows, with his head South.

Q. Did you know, or did you notice when you first saw him, the position or the location of his hands? A. His right hand was in his pocket.

Q. Were you present when his hand was removed from his pocket? A. Yes.

Q. What if anything was in his hand? A. Some playing cards.

Q. And what, if anything else, was in his pocket, if you saw it? A. I did not see anything else.

Q. What happened to the rest of the cards, if you saw, when his hand was removed from his pocket? A. I do not recall.

Q. Did you see any cards scattered about the floor? A. I do not recall that, either.

Mrs. Stiles: Mr. Hayes, you may question.

187 *Cross examination by Mr. Hayes:*

Q. Doctor who removed the hand from the pocket, do you remember sir? A. No, I do not. It was either Mr. Small or myself.

Q. Is Mr. Small here? A. Mr. Small is the morgue attendant.

Q. I know Mr. Small. I meany is he here this morning? A. I do not know.

Q. I mean you have not seen him? A. No, sir.

Q. Did the photographer get there before or after you did? A. After.

Q. Were pictures taken while you were there? A. Yes, sir.

Q. Were you there when all the pictures were taken? A. I cannot answer that. When I got there I was told that the photographer was not there yet and we waited around. There came a time when he came, took pictures, and then the body was examined by me, the hand was removed and the cards noted. I do not believe I remained there very long after that.

Q. Do you recall the photographer taking pictures before the hand was removed and after? A. I cannot answer that specifically. Pictures were taken and my recollection is that they were
188 taken before the body was touched. Whether any were taken after that, I am not sure.

Q. With respect to the hand when it was removed, were there just a few cards in the hand, as you remember it? A. That is right.

Q. Were any cards on the table at the time? Did you notice any cards on the table? A. No, sir, I do not recall.

Mr. Hayes: Very well, that is all I care to ask the witness.

The Court: You may be excused.

(The witness was excused.)

Mrs. Stiles: Call Officer Wyatt.

Thereupon, WILLIAM J. WYATT was called as a witness on behalf of the Government, and being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. Stiles:

Q. Will you state your full name for the record. A. William J. Wyatt.

Q. You are attached to the 2nd Precinct of the Police Department of the District of Columbia? A. I am.

Q. Did you go to the scene of the shooting on February 189 8, 1947, at 1718 Ninth Street, North West? A. I did.

Q. Who was with you, if anyone? A. Officer Luther Miller.

Q. When you arrived there, Officer, who was there, if you recall? A. I know the scout car, 21, with Officer Denny and Officer Cox. They were on the scene at the time I arrived.

Q. Had the Homicide men arrived when you got there? A. I believe they were on the scene when I arrived.

Q. Did you go into the place? A. I did.

Q. You went into the house? A. Yes.

Q. Were you there when photographs were taken? A. I guess I was.

Q. Did you see anywhere about the room any playing cards? A. I believe I did see a few right near the body. I cannot swear to that, but I think I did see some.

Q. Did you tell this gentleman here that you saw cards scattered over the floor? A. I told him, in talking to this gentleman, that that was over a year ago I could not exactly tell, exactly what 190 had happened and what was there, but as nearly as I could remember, there were some cards there on the floor. Whether they were scattered or not, I don't know.

The Court: Mrs. Stiles, we are making a record. I think you ought to identify the gentleman instead of just pointing to him.

Mrs. Stiles: "This gentleman" is Mr. Holzworth.

By Mrs. Stiles:

Q. When you first arrived there, Officer Wyatt, where was the body of the deceased? A. It was lying near the bureau which was on the South side of the room. His head was South and his feet were North-West I believe.

Q. Did you notice where his hands were? A. I believe his hands were out of his pocket at the time. I am not sure.

Q. Officer Miller was with you at that time? A. Yes, he was.

Mrs. Stiles: You may question, Mr. Hayes.

Cross examination by Mr. Hayes:

Q. Were you there, Mr. Wyatt, when the photographer came? A. I don't know whether he arrived before or after. I was there when the pictures were taken.

Q. Were you there when all of the pictures were taken?
191 A. Yes, I was.

Q. You remember having a conversation with Mr. Holsworth? A. I do.

Q. Did he at the time have a sheet of paper on which he was making notes? A. He did not make the notes, I don't believe, until after he had finished reconstructing the scene.

Q. While he was there in conversation with you and Officer Miller, he did make some notes, and reconstructed the scene? A. Yes, he did.

Q. Did he show you those notes? Did he not ask you to sign the paper? A. After we arrived at the precinct, he asked if we would sign them. I made it clear to him that I could not remember what happened a year ago and signed to that effect.

Q. Did he show you a notation he had made as presumably a statement coming from you, that there were some cards on the floor and some on the table and that they were scattered all over the floor? A. I do not remember what he asked me at the time, sir, but he did ask me about some cards. I told him at that time
that I could not be positive as to whether the cards were on
192 the floor—I know they were on the floor—whether they were scattered or not.

Q. Would you be able, to identify, sir, the paper and writing that was shown to you at the time you signed it? A. No.

Q. There would be no purpose in handing this to you because you would be unable to identify it? A. That is right.

Q. You do remember having had the conversation with him about it? A. Yes, I do.

Q. Now getting back to the scene itself, sir, as I understand, Officer Cox and Officer Denny arrived ahead of you? A. Yes.

Q. They were there when you arrived? A. Yes.

Q. Now you answered Mrs. Stiles by saying that the Homicide men were there. By "the Homicide men," you refer to Officer Embrey and Officer Vogelsang; is that right? A. I do not remember who they were. I think that is right.

Q. Do you have a recollection as to whether they were Officers Vogelsang and Embrey? A. I do remember talking to them
193 later, but I did not take the report.

Q. Do you know they were at the scene? A. Yes.

Q. And the cards you say you saw on the floor, did you see them immediately when you went into the place? A. No. I did not pay very much attention to the scene, because, at the time, I was only there to relieve the scout car man.

Q. What cards did you remember seeing? Was that the picture that existed when you went into the place, you saw the man on the floor and saw a few cards lying by him at that time? A. I

couldn't say exactly when I saw the cards. All I remember is seeing some cards there on the floor. When it was, I could not say.

Q. You say that that man's hand was out of his pocket? A. That is right.

Q. Do you remember that as being the condition that you found when you went to the place? A. I could not say that, sir, because it has been quite awhile back. I would not say that his hand was in or out.

Q. Do you have a recollection of anyone taking his hand out of his pocket? A. No, I do not.

Q. You were there while the pictures were taken, you say,
194 while all of the pictures were taken? A. Yes.

Q. Do you remember seeing a knife there? A. No, I do not.

Q. Did anybody in your presence display a knife? A. No.

Q. I show you this knife, sir, and ask your whether or not you remember having seen that at the scene. A. I do not remember seeing any knife at all, sir.

Q. You don't remember seeing any knife at all? A. No.

Q. Nobody in your presence, then, produced a knife? A. No one.

Q. Did you help lift the body? A. Did I help to take the body out?

I was on the scene. I think my partner helped them. I don't think I helped move the body myself.

Q. Who else helped, do you remember that? A. The morgue man. It could have been my partner or another man who was on the scene.

Q. Was the table overturned in the place? A. I could not say, sir, whether the table was turned over or not. I do not exactly remember.

Q. Do you remember how long it was before the morgue wagon
came? A. I would say it was about—I don't think I could
195 say but I am sure it was over 20 or 30 minutes before the morgue wagon arrived.

Mr. Hayes: Thank you very much.

The Court: You may step down.

We will take our mid-morning recess at this time.

(The witness was excused.)

(A ten-minute recess was taken.)

The Court: We will proceed.

Mrs. Stiles: Your Honor, I have a number of officers here who are anxious to get away and I would like to make a statement and if Mr. Hayes would like to have them, I will put them on the stand.

Sergeant Embrey was a member of the Homicide Squad who accompanied Sergeant Vogelsang to the place. He is here and available. I understand he will merely corroborate the testimony of Sergeant Vogelsang.

The Court: I believe you better put each one on. It will take a few minutes, but in view of the nature of the proceeding, we should exhaust the matter.

Mrs. Stiles: Call Sergeant Embrey.

Whereupon, SGT. ALBERT L. EMBREY was called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mrs. Stiles:

196 Q. Will you state your full name for the record, please, Sergeant. A. Albert L. Embrey.

Q. You are a member of the Homicide Squad of the Metropolitan Police Department, are you not? A. I am.

Q. Did you go to 1718 Ninth Street North-West, February 8, 1947, the scene of the shooting of one Mr. Hunter? A. I did.

Q. We would like to know with whom you went there. A. Sergeant Vogelsang.

Q. When you arrived, who was there, if you recall. A. Officers Denny and Cox, from Number 2, uniformed men, in the scout car, and some other people that I do not remember. There were other witnesses to the scene of the shooting.

Q. Where was the deceased when you arrived? A. Lying on the floor on his back.

Q. Did you notice where his hands were? A. His right hand was in his right-hand pants pocket.

Q. Were you there when the photographers took pictures? A. I was in and about the scene, yes, ma'm.

Q. Were you present when the first picture was taken? A. Yes, ma'm.

Q. Do you know in what position the deceased was when
197 that picture was taken? Do you know what position his hand was in? A. We kept him intact until the photographers had taken their pictures. No one moved him at all.

Q. Was his hand in his pocket when the first picture was taken? A. That is right.

Q. Were you present when his hand was removed from his pocket? A. Yes, ma'm.

Q. What, if anything, was in his hand? A. A deck of cards. Playing cards.

Q. What, if anything else was in his pocket? A. A pocket knife.

Mrs. Stiles: Will you show him that knife, Mr. Clerk, please.

By Mrs. Stiles:

Q. Is that the knife to which you refer? A. Yes, ma'm.

Q. Now sergeant, did you see any cards other than these cards you have mentioned, in the hand of the deceased, did you see any other cards scattered around the floor or anywhere else? A. I did not, Mrs. Stiles.

198 Q. Did you see any card container anywhere? A. I do not recall.

Mrs. Stiles: You may question, Mr. Hayes.

Cross examination by Mr. Hayes:

Q. Do you have a recollection, Sergeant Embrey, as to whether or not the cards to which you refer were in a container? A. To the best of my recollection, Mr. Hayes, they were not. Mr. Small, the morgue attendant, removed the hand, and handed me a knife, that he had taken from the pocket. This is the knife, and I turned it over to Sergeant Vogelsang.

Q. You say a deck; was it a deck or just a few cards? A. Whether the deck was complete, I cannot say. There did not appear to be 52 cards, there.

Q. Is it possible there were but five or six cards in his hand? A. There were at least four times or five times that many.

Q. When you say that there wasn't a deck, I presume you did not count to see whether it was a full 52-card deck? A. That is right.

Q. Did any of the cards fall from his hand? A. I do not know whether they did or not. I mean his hand was taken from his pocket. I was anxious to know what was in that hand and it was cards.

199 Q. Where was the open knife? A. It was in his pants pocket. Small removed his hand from his pocket and searched his pocket completely and handed me the knife.

Q. The open knife was in the same pocket that the hand was removed from? A. Yes, sir.

Q. You were there when all the pictures were taken, sir? A. I do not recall, Mr. Hayes, whether I was or not. I know the photographer was there, we told him what we wanted and then went about something else.

Q. Do you remember how many pictures were taken? A. No, I cannot say how many were taken.

Q. Was the deceased moved at all prior to the time when you speak of removing his hand? A. I would like to clarify that.

Q. All right, sir. A. The deceased was not moved from the time I arrived at the scene until after the photographer had completed his picture. Now whether his body was moved out into the floor

further before Mr. Small took the cards out of his pocket or not, I do not know, but if the body is not in a position to be searched easily after we have completed our pictures, the morgue
200 attendent will very frequently move a body out where he can search it.

Q. Have you a specific recollection in this case as to whether or not there was a movement? A. No. I can say that the body was approximately near the same spot, because the table had been moved, I know, and the body was about in the center of the floor or in the middle of the floor where he could easily get around it to search it.

Q. That is where the body was when you went into the place? A. When I went into the place, the head was South and the feet were North, lying on its back as I recall, the head was between a stove and a dresser, wedged between the two.

Q. You said something about being in the center of the floor. Was the body in the center of the floor at the time you went in? A. No, it would be more toward the South part of the room when I first went into the room.

Q. Then when it got to be in the center of the floor that means somebody moved it, is that right? A. As I said when Mr. Small searches a body, he frequently moves it out.

Q. I am talking about this time. A. The body was out further into the floor when it was searched.

Q. The best of your recollection is that Mr. Small did
201 move the body for the purpose of searching? A. Yes, sir.

The Court: This was after the photographs were taken?

The Witness: Yes, sir.

By Mr. Hayes:

Q. After the first one or the second one? A. I don't understand what you mean by the first one or the second one.

Q. Was one taken with his hand in his pocket? A. The scene was photographed as it was when we arrived.

Q. At that time he had his hand in his pocket? A. Yes, sir.

Q. Subsequently a picture was taken with his hand out of his pocket; is that right? A. I believe it was, yes.

Q. Now between those times was the body moved? A. That I could not say. I could look at the pictures and tell you.

Q. You may look at them, sir. A. I see no picture taken with his hand out of his pocket.

Q. How many pictures have you there? A. I have six.

Q. Do you see a picture with some cards at the elbow of the deceased person? A. Yes, I do.

202 Q. Is the hand out of the pocket in that picture? A. I cannot see his hand in that picture, Mr. Hayes.

Q. Is your recollection that that was after the time that the hand was taken out of the pocket and the cards had been displayed and the knife had been displayed? A. I see no picture with a knife displayed.

Q. I don't get your answer. A. I ordered no picture with the knife displayed in it.

Q. You ordered no picture with the knife displayed in it? A. We tell the photographer what picture we want. Sergeant Vogelsang could have told him what pictures we wanted or I could have told him.

Q. You did not order anyone to show the knife displayed? A. I do not see a picture here with the knife displayed.

Q. Did you order one, sir? A. No, sir. I had no reason to order one.

Q. No one else ordered one, in your presence? A. Not in my presence.

Q. You know one was displayed? A. I know a knife was taken from the deceased.

Q. There at the scene? A. Yes. Mr. Small searched him and gave me the knife. That is the knife I identified.

203 Q. Did he give you the cards? A. No, sir, he did not.

Q. What became of the cards? A. I could not tell you.

Q. You have no idea as to who took the cards? A. No, I do not.

Q. Or as to whether or not anybody took them? A. No, I do not know who took them. They should have gone with his property. I can tell you what should have happened.

Q. I don't want to know what should have happened. I want to know what did happen. A. I don't know.

Q. With respect to the cards, you cannot help us as to whether anyone took them from the scene? A. No, I cannot.

Mr. Hayes: That is all.

Re-direct examination by Mrs. Stiles:

Q. Did you talk to the witnesses on the scene? A. Sergeant Vogelsang did that. He was handling the case.

Re-cross examination by Mr. Hayes:

Q. Just an additional question: Did you turn over the open knife to the prosecutor? A. I turned it over to Sergeant Vogelsang at the scene.

204 Q. After that time you don't know what happened to the knife? A. No, I turned it over to him.

The Court: You may step down.

(The witness was excused.)

Mrs. Stiles: I will call Officer Cox.

Whereupon, PRESTON M. COX was called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mrs. Stiles:

Q. Will you state your full name for the record, please? A. Preston M. Cox.

Q. You are attached to which precinct? A. I am attached to Number 2.

Q. Number 2 Precinct of the Metropolitan Police Department, are you not? A. That is right.

Q. Did you go to the shooting of Mr. Hunter on February 8, 1947? A. Yes, Ma'm.

Q. Were you accompanied by another officer? A. I was.

205 Q. Who was that? A. Officer Denny.

Q. Were you and Officer Denny the first officers to arrive on the scene? A. We were.

Q. You were the first? A. Yes, ma'm.

Q. Where was the body of the deceased when you arrived? A. The body of the deceased was lying on the floor, just opposite the door with the head sort of propped up, slightly.

Q. Where were his hands, if you noticed? A. One hand was in his pocket, his right hand.

Q. Did you observe any cards anywhere about the room at that time? A. No, ma'm.

Q. Were you there when the deceased's hand was removed from his pocket? A. I was.

Q. What, if anything, was in his hand? A. There was a deck of cards.

Q. Did you observe anything else that was removed from his pocket? A. No, not at that time, no, ma'm.

Mrs. Stiles: You may question, Mr. Hayes.

Cross examination by Mr. Hayes:

206 Q. Mr. Cox, you and Mr. Denny were there together, is that right sir? A. Yes.

Q. When you got there, you immediately went to the scene to the room where the shooting had occurred? A. Yes, sir.

Q. At that time you indicated you saw the body lying there, but saw no cards anywhere, am I right as to that, sir? A. That is right.

Q. Did there come a time when other officers came to the scene? A. Yes, sir.

Q. Do you remember who they were and in what order they came? A. There were two officers from the Homicide.

Q. They were the next ones there after you arrived? A. Yes, sir.

Q. Those were officers Vogelsang and Embrey? A. And Embrey, that is right.

Q. Then who came? A. Then came the two officers on the beat.

Q. They were officers Miller and Wyatt? A. Miller and Wyatt, yes, sir.

Q. That is the order of arrival in which the people came?

207 A. Yes, that is right.

Q. Until the time that the photographer came, had the body been touched or moved in any way? A. No, the body had not been moved.

Q. The photographer took the pictures, I believe, with the hand in the pocket; is that right, Mr. Cox? A. Yes.

Q. Someone then removed his hand from his pocket. Do you know who? A. It was a man from the Coroner's Office, Mr. Small.

Q. At that time, you say, that he had a deck of cards in his hand? A. Yes, sir.

Q. Was the deck in a container? A. No, sir.

Q. You are certain of that? A. I am certain of that.

Q. Was Mr. Denny with you at that time? A. Mr. Denny was about the room, I do not know just where.

Q. You saw no knife? A. No, sir.

Q. Did you see what Mr. Small took from the pocket of the deceased person? A. I did.

208 Q. You say there was no knife at that time? A. Not at that time, no.

Q. Did you continue to stay there, sir, until the body was removed? A. No, I left before the body was removed.

Q. When, sir, with respect to the taking of pictures, did you leave A. Just shortly thereafter.

Q. When the hand was removed from the pocket, sir, with the deck of cards in it, were any cards dislodged from the pack? A. No, I do not think so. There seemed to be a full pack.

Q. It was still in his hand? A. It was in his hand, yes.

Q. The picture was taken in that posture? A. Yes.

Mr. Hayes: I think that is all I want to ask you.

The Court: The officer may be excused.

(The witness was excused.)

Mrs. Stiles: I will call Officer Denny.

Whereupon, LARRY V. DENNY was called as a witness, and, having been duly sworn, testified as follows:

209 *Direct examination by Mrs. Stiles:*

Q. Will you state your full name for the record, Officer? A. Private Larry V. Denny.

Q. You testified in this case both at the morgue and in the trial of the case, did you not? A. Yes, ma'm; I did.

Q. Did you go to this scene of this killing of Mr. Hunter with Officer Cox? A. Yes, ma'm.

Q. Who was there when you arrived, if anyone, or were you the first there? A. We were the first ones.

Q. Where was the deceased when you got there? A. He was slumped on the floor on the far wall. That would be the South wall of the room, the first floor, front room.

Q. Where was his hand, if you noticed? A. His right hand was in his right pants pocket. The other hand was laying free.

Q. Now Officer, I believe you testified at the morgue that you saw—

Mr. Hayes (Interposing): Now just a minute, Mrs. Stiles; don't tell him what he testified.

Mrs. Stiles: May I ask him when he testified?

210 Mr. Hayes: Yes, ma'm.

By Mrs. Stiles:

Q. Did you testify at the morgue that—

The Court: Do you mean at the Coroner's inquest?

Mrs. Stiles: Yes.

Mr. Hayes: I think there is a very important point here, and I do not want Mrs. Stiles to lead. If he wants to volunteer what he said, that is all right, but I don't want her to say didn't you say something.

The Court: Suppose you do not ask him concerning his testimony at the Coroner's inquest. Suppose you put the question directly.

By Mrs. Stiles:

Q. Officer Denny, when you arrived at the scene with Officer Cox, did you see any cards anywhere about the place? A. I saw no cards. There was a cardboard playing card container lying on the floor, to the best of my memory.

The Court: There was what?

The Witness: A container or a package for playing cards.

By Mrs. Stiles:

Q. Do you recall where that was on the floor? A. It was on the floor. It was very near a small card table that was in the place there.

Mrs. Stiles: I believe he stated the deceased's hand was in his pocket when he arrived.

Mr. Hayes: Yes.

211 *By Mrs. Stiles:*

Q. Were you present when the deceased man's hand was removed from his pocket? A. No, I was not.

The Court: Did I understand you to say this officer was a witness in the trial? According to the index of witnesses, he was not.

Mrs. Stiles: He was not? Then I am mistaken. I have not seen the transcript of the trial for some time.

The Court: I have the transcript before me.

Did you not testify at the trial in this matter?

The Witness: No, sir.

Mrs. Stiles: He received at the Coroner's inquest an examination. I have that here. I believe I am mistaken in that.

I believe that is all I have.

Cross examination by Mr. Hayes:

Q. When you arrived, Mr. Denny, you saw no cards on the table, is that right, sir? A. No, sir.

Q. Did you see any cards on the floor? A. No, sir.

Q. Now you say you testified at the morgue in this hear-
212 ing? A. Yes, sir.

Q. Your name is Larry V. Denny? A. Yes, sir.

Q. I call your attention, sir, to the fact that in the transcript on page 5, in the cross-examination by Mr. Stearn you were asked this question: "Did you see any cards on the table?" Your answer: "No, sir. The deck of cards was on the floor." A. I do not recall exactly word for word what I testified to. I assume I was referring to the playing card package.

Q. You were not referring to a playing card package when you said the deck of cards was on the floor, and you were asked, did you see any cards on the table and you said, no, sir, the deck of cards was on the floor, you were not referring to a container then, were you? A. There were no cards that I saw at all. The only thing I saw was the container for playing cards.

Q. Let me ask you this, then, sir. The question then followed: "On the floor?" Your answer: "Yes." Question: "Were they inside of the card container or were they scattered about?" Answer: "They were in the card container."

Do you remember that? A. No, sir. I do not remember that.

Q. There is your testimony, sir, transcribed as taken
213 at the morgue. A. I do not deny the testimony; I do not remember.

Q. Which is the fact, that you are testifying to now, or what you testified to then? A. My memory at the particular time, the only thing I can remember having seen on the floor is a playing card package. I could be wrong.

Q. You testified at the morgue first of all, sir, that you saw a deck of cards on the floor and you testified that they were in the container. Now is that true? A. What, that I testified to that?

The Court: You have asked him that and he has given his explanation.

After all, Mr. Hayes, the testimony given at the Coroner's inquest is not newly discovered evidence. There is a motion for new trial on newly discovered evidence.

Mr. Hayes: If Your Honor please, I think the question of whether the cards were strewn, whether or not they were in a container, whether or not there were a few cards in the man's hand, are significant details which I want to urge upon Your Honor.

The Court: I am not trying to exclude anything. I mention this by way of suggestion.

Mr. Hayes: Yes, Your Honor.

214 *By Mr. Hayes:*

Q. Did you see a knife at the time, sir? A. No, sir.

Q. Were you there when Mr. Small did take the hand from the pocket? A. No, sir.

Q. You were not there when his hand was removed? A. No, sir.

Q. Where were you, sir? A. I do not particularly recall. We came in, being the officers assigned and given the run on the case, we were responsible to make the report. When we arrived, there, the members of the Homicide Squad were there, or came very shortly, almost at the same time that we got there. I think we were the first officers in the building, and as soon as everything was in order and we get the men on the beat, there, we left for the station and made a report.

There was a time we went back.

Q. I am not talking about when you went back. I am talking about this time. A. I did not go back in the room when I left.

Q. When you first went there, were you and Officer Cox together? A. Yes, sir.

215 Q. Did you stay together until you went back to the Precinct to make a report? A. No, I do not leave. There was one time when one of the detective sergeants went upstairs for the purpose of locating a witness. As best I remember, I believe I followed him up the stairs to see that he did not need any help and that was the nearest we came toward leaving each other. Actually, we were together. I did not leave him and he did not leave me. I left the room at one time and whether he did or not, I don't know.

Q. Aside from the time when you say you may have gone up the steps, the rest of the time you were in the room? You went,

out somewhere else? A. We left before the man from the morgue came.

Q. The man from the morgue was the man who removed the hand from the pocket, was he not? A. I do not know.

Q. You were not there when the hand was removed at all? A. No, sir.

Q. Were you there when the pictures were taken? A. No, sir.

Q. And neither was Officer Cox? A. I do not know whether he was or not.

Q. You and he were together, were you not? A. After we went back to the precinct and the report was on the book.

Q. Answer my question, sir. You and Officer Cox were
216 together? A. Yes, we were.

Q. And remained together, aside from the time when you may have gone up the steps until the time you went back to the precinct? A. I do not know that we remained that close together.

Q. You did not go outside of the room for any other purpose, did you, Mr. Denny? A. There was a lot of confusion and a lot of work to be done. I was mainly interested in getting the information. I was making the report for the book and I didn't pay too much attention to Officer Cox.

Q. You were getting the information from the room, were you not? Where else would you get the information? A. When the doctor came, I believe I was out in the hall with the detectives from the homicide Squad and of course when the doctor came, I went in to get his name and proper information and time the man was pronounced to be dead.

Q. Is it your suggestion that you went there to make the investigation and then you went out in the hall by yourself? A. The best I can recall is that at one time I did go out in the hall. However, they were not taking any pictures during that particular time, and we left the scene before they did take pictures. However, we came back at a later time.

217 Q. Were you there when the pictures were taken? A. I was not in the building. Officer Cox went into the building. Whether he got into the room or not, when they were taking pictures or whether they were through when he got there, I couldn't say.

Q. You went back to the precinct to do what? A. To make the report.

Q. What report? A. The report to the Chief.

Q. How did you happen to go there? A. We were sent by radio car.

Q. You knew there was a shooting there? A. We had to make a report of the shooting.

Q. You didn't leave before you had gotten all your information, had you? A. No, sir, except for the fact that we did not know where the bullet had penetrated the man. That was the only piece of information we needed.

Q. Did you know the photographers were coming? A. Yes, sir.

Q. It did not occur to you to wait and see? A. We had a man on the beat to wait for the photographers and stay with the body and we went back in service.

Q. What did you come back for then? A. I don't know
218 what the time was, it was at a later time after the men on the beat had gotten there.

Q. I will not question you further.

The Court: Step down. The officer may be excused.

(The witness was excused)

Mrs. Stiles: Call Officer Miller.

Whereupon, LUTHER MILLER was called as a witness and, having been duly sworn, testified as follows:

Direct Examination by Mrs. Stiles:

Q. You may state your full name for the record. A. Luther Miller.

Q. You are attached to what precinct? A. Second Precinct.

Q. Number 2 precinct of the Metropolitan Department, are you not? A. That is right.

Q. Did you go with Officer Wyatt to the scene of the shooting of Mr. Hunter on February 8, 1947, 1718 Ninth Street, North-West? A. I did.

Q. Who was there when you arrived, if you recall? A. There were two scout car men there, Officers Cox and Denny, two detective sergeants from the Homicide Squad, Vogelsang and Embrey.

219 Q. Where was the deceased when you arrived? A. He was in a partly-reclining position on the floor with his head propped back between I believe it was two tables or two pieces of furniture.

Q. Where were his hands, if you noticed? A. I did not notice his hands. I do not remember where his hands were.

Q. Did you see any playing cards scattered over the floor? A. I saw some cards, but I cannot recall just how they were on the floor.

Q. Do you not recall where you saw them? A. No, I don't.

Q. Let me ask you this: Did you tell this gentleman, Mr. Holzworth, in an interview he had with you, that you saw playing cards scattered over the floor when you arrived at the scene? A. I told him there were cards on the floor, but due to lack of time, I don't remember.

The Court: Did you use the word "scattered"?

The Witness: No.

Cross Examination By Mr. Hayes:

Q. Mr. Miller, have you a recollection, now, as to whether
220. they were scattered? A. No, I do not.

Q. Do you have a recollection at all as to what the condition was with respect to the cards? A. No, I merely have an impression of cards being on the floor.

Q. Were you there, sir, when pictures were taken? A. I was there when the pictures of the bullet holes in the door and the walls were taken.

Q. Were pictures not taken of the body at that time? A. I think I arrived after that time.

Q. Sir? A. I think I arrived just after the pictures were taken of the body.

Q. Did not the photographer come after all of you gentlemen had arrived? A. I cannot be positive about that.

Q. Give us your best recollection, sir. When you got there, as I understand, Officer Cox and Officer Denny were there; is that right? A. That is right.

Q. Did they stay there during the entire time that you were there? A. They left after I arrived, or shortly after I arrived.

Q. Both of them? A. Both of them, yes, sir.

221 Q. Had the photographer come at that time? A. He was there at the time.

Q. The photographer was there before they left? A. That is right.

Q. Sir? A. That is right.

Q. Now had he begun taking pictures? A. He was in the process of taking pictures when I arrived. That is as nearly as I can remember, now.

Q. At that time, when you arrived, there were cards scattered on the floor—I am sorry. You said you would not use the expression "scattered." You said you would agree there were cards on the floor? A. I remember cards being on the floor.

Q. Did you see at any time a picture taken of the deceased person with his hand in his right hand pocket? A. I did not.

Q. Do you remember what picture was taken while you were there? A. The pictures of the bullet holes in the door and in the wall.

Q. Where, sir? A. In the door and in the wall.

Q. Is that all? A. That is all I remember.

222 Q. No pictures of the body were taken at all while you were there? A. I do not remember it.

Q. Does that apply also to your partner, Mr. Wyatt?

Mrs. Stiles: I object to that.

Mr. Hayes: The question is perhaps not properly framed.

By Mr. Hayes:

Q. Was Mr. Wyatt with you during the entire time you were there? A. Yes, he was, but we were in and out of the room.

Q. When Mr. Wyatt arrived, they were also in the process of taking pictures; is that right, sir? A. Yes, sir.

Q. You say that no picture was taken of the body during that time?

The Court: He did not say that. He said he did not remember.

By Mr. Hayes:

Q. Is it your best recollection there was none taken at that time? A. That is right.

Q. Is it your recollection that the body had its hand in or out of a pocket at that time you arrived? A. I did not go to that side of the body.

Q. You did not go to which side of the body? A. To the right side of the body.

223 Q. Why did you say anything about the right side; I did not say anything about the right side. A. Because I was asked a question, if I saw the deceased's hand in his pocket. In his right-hand.

Q. Did I say "right-hand"? A. No, sir.

Q. Why did you decide it? A. I wasn't asked the question by you.

Q. By whom were you asked the question? A. By this gentleman here.

Q. You mean when you talked to Mr. Holzworth, you at that time were asked as to whether or not the man's right hand was in his pocket? A. That is right.

Q. Your answer to that was what, sir? A. I don't remember seeing the hand in the pocket.

Q. That is what you told him, that you did not remember seeing the hand in the pocket? A. That is right.

Q. Do you remember where the cards were, with regard to where the body was, the relative position of the cards? A. No, I do not.

Q. Could you give us any idea of how many cards you saw? A. I could not do that, either.

224 Q. Approximately? A. I do not have any idea.

Q. None at all? A. No.

Q. Not as to whether there were four or five or a full deck? A. I really could not say.

Q. Were the cards in a container or were they loose? A. I could not say that, either.

Q. You do not remember whether or not there were in a container or boxes? A. I do not.

Q. Did you see anybody at that time take up or dispose of the cards which you saw? A. No, sir, I did not.

Mr. Hayes: All right, sir, I have no further questions.

The Court: The officer may be excused.

(The witness was excused.)

The Court: Does that exhaust the witnesses.

Mrs. Stiles: No, it does not, Your Honor; there are two others. I will call Mr. Small.

Whereupon JOSEPH SMALL was called as a witness and, having been first duly sworn, testified as follows:

225 *Direct examination by Mrs. Stiles:*

Q. State your full name for the record. A. Joseph E. Small.

Q. You work at the morgue, do you not, Mr. Small? A. That is right.

Q. Mr. Small, in your duties in connection with the morgue, did you go to 1718 Ninth Street, North-West on February 8, 1947, and there take care of the body of Mr. Hunter? A. I did.

Q. When you arrived, there, Mr. Small, where was the deceased's body? A. Laying right beside a table.

Q. Who was there when you arrived? A. There was quite a few, there. I don't know just who was there. The Homicide Squad. Quite a few people around there.

Q. When you first saw the body of the deceased, where were his hands? A. In his pocket.

The Court: You said, "Where was his hand." Which hand?"

By Mrs. Stiles:

Q. Where was his right-hand? A. In his pocket.

Q. Was this hand removed from his pocket while you were
226 there? A. It was.

Q. Who removed it? A. I did.

Q. What, if anything, was in this hand? A. Cards.

Q. What else, if anything was in the pocket? A. A knife.

Q. Was there anything else in that pocket? A. Not as I know of.

Mrs. Stiles: Mr. Clerk, will you show Mr. Small the knife.

By Mrs. Stiles:

Q. Is that the knife you refer to, Mr. Small? A. That is the knife, I think. There is a broken blade.

Q. Did you turn this knife over to the Homicide squad? A. I did.

Q. Did you see any cards scattered about the room other than the cards you have mentioned? A. When the cards came out of his pocket a couple of them fell on the floor.

Q. Did you see any other cards scattered about anywhere? A. Only what were scattered when his hand came out of his pocket, that was all.

Q. Let me ask you like this: Did you take any money off
227 of the deceased? A. I removed one dollar and a pocket book.

Q. Was one dollar all the money he had on him? A. One dollar.

Mrs. Stiles: You may question, Mr. Hayes.

Cross Examination By Mr. Hayes:

Q. When you say "Right-hand pocket," I presume you mean his right-hand trouser pocket. A. That is right.

Q. It was from that pocket you removed his hand? A. That is right.

Q. When you removed him, sir, you say there were some cards in his hand. Could you tell me approximately how many cards? A. I did not count them.

Q. Were there a few? A. I suppose there might have been a deck of cards, I don't know. I did not count them.

Q. Did it appear to be a deck? A. There was a good few cards. I would not say there were three or four, or two or anything like that; there were more.

Q. Would you say there were five or six? A. Oh, yes, there were five or six cards.

Q. Could that have been approximately the number that
228 were in his hand? A. I do not know. I would not swear to that.

Q. Coroner Rosenberg was there at the same time, was he not, sir? A. I could not tell you that.

Q. You do not remember whether the Coroner was there at the time you removed the hand? A. I don't remember.

Q. You remember Deputy Coroner Rosenberg being there, don't you, Mr. Small? A. No, I cannot say I can.

Q. At the time when you took the cards out of his pocket or his hand out of his pocket with the cards in it, was that at the same time you took the knife from his pocket? A. No afterwards.

Q. How long afterwards? A. Immediately afterwards.

Q. You took his hand out and then you put your hand back in his pocket and took the knife out? A. That is right.

Q. You turned them both over to the Homicide Squad at the same time? A. Yes.

Q. Was the knife in his pocket open or closed? A. It was open.

Q. Did you have a conversation with Mr. Holzworth about this? A. I did.

Q. Did you tell him that there were cards scattered on the floor? A. I told him there were cards on the floor, but not all over the floor.

Q. Not necessarily all over, but did you tell him they were scattered? A. There was cards, yes.

Q. Did you tell him they were scattered on the floor?

The Court: Did you use the word "scattered"?

The Witness: Yes, they were scattered.

The Court: Did you say "all over the floor"?

The Witness: No, I did not say "all over the floor."

By Mr. Hayes:

Q. You used the word "scattered," but not "all over the floor", is that right? A. The cards that were scattered on the floor was from where I pulled them out of his pocket and they dropped on the floor.

Q. Did you tell that to Mr. Holzworth? A. I don't know whether I did or not. He came down to my house to talk to me about it.

Q. Did you tell him there were cards scattered on the floor when you went into the room? A. No.

Mr. Hayes: That is all.

The Court: The witness may be excused.

(The witness was excused.)

Mrs. Stiles: I will call Mr. Cornweld.

Whereupon, CHARLES CORNWELD was called as a witness and, having been first duly sworn, testified as follows:

Direct Examination By Mrs. Stiles:

Q. State your full name for the record. A. Charles Cornweld.

Q. Where do you work? A. Government Printing Office.

The Court: This witness testified in the trial, so you need not go through any preliminaries. Just bring out any new matter. If he testified at the trial concerning any of these matters, you need not bring them out again.

By Mrs. Stiles:

Q. Mr. Cornweld, did you have a conversation with this gentleman, Mr. Holzworth, here? A. Yes, ma'm, I did.

Q. Did you tell him that at the time of the shooting, after the shooting, that there were playing cards scattered over the

231 floor? A. No, Mrs. Stiles, I told him I saw the cards on the pictures produced down in Court.

The Court: Just a moment. I cannot understand what you were saying. Will you speak slowly, distinctly and a little more loudly.

The Witness: He asked me about the cards, and I told him that I saw the cards when he showed us the pictures. When he asked if they were scattered all over the floor, I told him no more than I could see was on there, and furthermore, anything else he wanted to know about the cards he could ask Mrs. Stiles about them because I only saw them on the pictures.

By Mrs. Stiles:

Q. You saw those pictures when you were interviewed in my office, did you not? A. Yes, ma'm.

Q. At that time were all the other witnesses in the case present? A. Yes, ma'm.

Q. Were the police officers present? A. Yes, ma'm.

Mrs. Stiles: You may question, Mr. Hayes.

Cross Examination By Mr. Hayes:

Q. Did you tell Mr. Holzworth in the presence of Mr.
232 Griffin's sister that there were cards scattered on the floor? A. I did not say they were scattered on the floor. I said I only saw them on the pictures in the court.

Q. Were you in the room when the pictures were taken? A. No, I was not.

The Court: This witness testified at the trial and this is not newly discovered evidence.

Mr. Hayes: May I ask this question, in deference of Your Honor's ruling——

The Court: This is only a suggestion. I am willing to exhaust this subject.

By Mr. Hayes:

Q. Were you there at the time when pictures were taken at the scene? A. No sir, I was not there.

Q. You were not there? A. No, sir.

Mr. Hayes: I have no questions.

The Court: The witness may step down.

(The witness was excused.)

The Court: Is there anything further?

Mrs. Stiles: I have nothing further.

Mr. Hayes: Nor I, Your Honor.

The Court: Would you care to be heard orally?

Mr. Hayes: Just for approximately two or three minutes
233 if Your Honor will allow.

The Court: Proceed.

Further argument on behalf of defendant.

Mr. Hayes: First, if Your Honor pleases, I am fully aware that at this stage of the trial there is only one thing that is before Your Honor and that is the question of a motion for a new trial on the grounds of newly discovered evidence. I am going to confine these few remarks to what I believe to be the significant part of that newly discovered evidence.

There is at least now a shown conflict as to whether or not this man at the time that the officers came, had in his pocket, a deck of cards, or as to whether he had a few cards in his hand. I think it is significant for this reason if Your Honor pleases: Your Honor will remember that in answer to my question of Mr. Rosenberg, who was the Deputy Coroner there at the time, he said when his hand was removed, he had some cards in his hand. I said to him, "Dr. Rosenberg, Just a few cards?" and his answer was "yes."

Now the picture that has been offered, I respectfully suggest, Your Honor, shows also approximately some maybe four or five cards in his hand—I mean in the picture near his elbow.

Now it seems to me that that is very important. There were two versions of this case, and I presume, and I have no way of presuming other than I know what the Prosecutor would like to argue, in view of the fact in the transcript of the
234 record which Your Honor allowed me to read, one of the issues urged was the question of veracity of witnesses, because the Defendant's point of view was that he fired this shot in self-defense, and that he fired it at a time when a card game was going on, and when, having had some discussion about a hand in black-jack, where the man was attempting to take the entire pot, that he took the position he wasn't entitled to it; that the man started around the table after him with his hand in his pocket and that he fired the fatal shot.

Now the other people say that that did not happen; that they had some discussion either about cards or about the little girl who was the child of the deceased person and that the Defendant left and went away and was away for ten or fifteen minutes and came back and said, "Nobody is going to talk about kicking my teeth out," and began firing.

The Court: I recall the testimony.

Mr. Hayes: With respect to the number of cards, if Your Honor please, it seems to me that had the jury the advantage of knowing that there was this question of a few cards in his hand that the

cards were in his pocket; that they were removed from his pocket when his hand was taken out of his pocket and none of that I respectfully suggest was in the transcript of record, that if that had been before the jury, it would have tended to corroborate what the Defendant had said, that it happened at the time when they
235 were engaged in this game; that the man stuck his hands in his pocket presumably with the cards in his hand; that there was an open knife in his pocket and that he came around the table after him.

I respectfully suggest to Your Honor that both of those situations are entirely inconsistent with the Government's point of view.

If, as a matter of fact, there had been a game and the game was over, there is little likelihood, I respectfully suggest, that the man would have had a few cards in his pocket at that stage.

If the game were over, the presumption would be that the cards would be put back in the container and it has been developed here this morning that one of the witnesses who was there first of all testified that the cards were in a container at the morgue. That was not the testimony at the time of the trial, but at the morgue he testified that the whole deck of cards were in a container and were not scattered on the floor.

Now we have the picture then with two things: The cards, which I respectfully suggest to Your Honor, if they were as indicated and there is testimony to support it; a few in his hand, indicating that the game was in progress; an open knife, and that wasn't before the jury either at the time of this trial.

Now I know there was testimony at the time of the trial that the man had his hand in his pocket; that he came around
236 with his hand in his pocket, and I know that that heretofore would have carried the question of a menace, which was argued at the time the case was heard.

I respectfully suggest to Your Honor that had the jury known there was the open knife, that they would have been inclined to believe that the Defendant's version of the story was correct, rather than that of the prosecution, because conceivably again there would have been no reason why fifteen minutes thereafter he would have been standing there at the time this man came in, with an open knife in his pocket.

I respectfully suggest to Your Honor that those things are pertinent circumstances.

Your Honor has allowed me the privilege of arguing this before, and I don't want to repeat myself, but I say those circumstances are such that had the jury those facts before them, not that it would have changed their verdict, but, as a matter of fact, if there is evidence that might have tended to change them, or might have

tended to reduce what they did rather than bring in a First Degree Murder decision, then there ought to be grounds for Your Honor to allow a new trial.

I respectfully suggest that Your Honor do that under these circumstances.

Ruling of the Court

The Court: Defendant Baxter Griffin was convicted of Murder in the First Degree. The conviction was affirmed by the Court of Appeals, and a writ of certiorari denied by the
237 Supreme Court of the United States.

He now moves for a new trial on the ground of newly discovered evidence.

This motion was filed in his behalf by a gentleman who is not a member of this bar and accordingly the Court appointed Mr. George E. C. Hayes to argue this matter, and wishes to express to Mr. Hayes gratitude for accepting this as a public duty.

The deceased was fatally shot by the Defendant. This is not denied. The Defendant contended, however, that he shot in self-defense. Admittedly, there was a quarrel between the deceased and the Defendant. There is a dispute as to whether the quarrel was in the course of a card game or took place after a card game had been completed and concerned another subject.

The Defendant testified at the trial in his own behalf that the deceased made a menacing gesture, or what amounted to a menacing gesture, in the Defendant's direction. This gesture consisted of the deceased putting his right hand in his trousers pocket and coming in the direction of the Defendant.

It now appears that it is made on the basis for this application, that the deceased had an open pocket knife in his pocket at the time he made the menacing gesture. It does not appear, how-
238 ever, that he had withdrawn the knife from his pocket and it does not appear that the Defendant knew that the deceased carried an open pocket knife at the time. Moreover, the open pocket knife was not in the hands of the deceased when the hand of the deceased was taken from his pocket. A number of playing cards was found in it and further search revealed the knife in his pocket, apparently lying loose.

The Court is unable to perceive that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case.

The question is whether the Defendant shot in self-defense. All that he knew was that deceased made to the Defendant what seemed to be a menacing gesture; namely, that the deceased put his hand in his right-hand trousers pocket. Moreover, it appears affirma-

tively that the deceased did not grab the knife but had a number of playing cards in his pocket. The knife was lying in his pocket, loose.

The question whether a person is justified in attacking an assailant in self-defense must be determined by the facts which were presented to the person who pleads self-defense. He did not know, it appears, that the deceased had an open knife in his pocket, and therefore its existence is irrelevant.

The second basis for the motion is additional testimony tending to show that a number of playing cards were strewn on the floor of the room in which the shooting took place. Now
239 witnesses produced in support of this contention were the same witnesses who testified at the trial; so there is nothing newly discovered in that respect. Moreover, that is a circumstance which does not appear to the Court to be of any substantial importance. The fact that a card game had taken place is not disputed. Whether it was still in progress or whether if had ceased is not very important, so far as the Court views the issues of this case. Moreover, the fact that there were cards on the floor would not necessarily establish that the game was still in progress.

The Court realizes the importance of the issue presented to it but verdicts of juries must not be lightly set aside. The Court feels that it would be acting improvidently if it granted a new trial on the basis of the facts here presented. The Court felt that these contentions should be examined exhaustively and this has been done.

The motion for a new trial is denied.

Mr. Hayes: I propose that under the rules we could reserve exception to Your Honor's ruling.

I do reserve exception, Your Honor.

Mr. Holzworth: Your Honor, I understand Mr. Hayes was appointed by the Court for the purpose of this motion. I have available here local counsel who have been paid and retained in this case, just so there will be no delay, because an appeal will be taken to the Court of Appeals.
240 Do you wish me to bring in that local counsel and move my admission, or just what does Your Honor permit, so that I can proceed to have the appeal filed before the Court of Appeals, of which I am now a member?

The Court: Mr. Hayes will continue as counsel on the case if he will be good enough, unless and until the Defendant retains other counsel who is a member of this Bar.

Mr. Holzworth: That is what he has done, sir.

The Court: The Court has no evidence of that as yet because no appearance has been filed.

The Court appreciates the fact that it is imposing an onerous duty on Mr. Hayes.

Mr. Hayes: I am very happy to do whatever Your Honor desires. I understand from Your Honor's suggestion that I shall have done my duty as far as the Court is concerned if and when I am advised that local counsel has been employed; am I correct, sir?

The Court: Yes, and files an appearance.

Mr. Hayes: Thank you.

(Thereupon, at 12:45 o'clock p. m. an adjournment was taken.)

241 *Certificate of Official Reporter*

I, Robert C. Cochran an official substitute court reporter of the District Court of the United States for the District of Columbia, hereby certify that the foregoing pages 1 to 66 are a true, accurate and complete transcript of the testimony and the proceedings had on motion for a new trial on newly discovered evidence in Criminal Action No. 246-47, United States vs. Baxter Griffin, on May 25, 1948.

(s) Robert C. Cochran,
Official Substitute Court Reporter.

242-249 In the United States Court of Appeals
for the District of Columbia

Number 9882

Baxter Griffin, *Appellant*,

v.

United States of America, *Appellee*.

Motion to Dismiss Appeal.

Filed June 9, 1948

Comes now the United States, by its attorney, the United States Attorney, and moves that the pending appeal be dismissed for lack of merit.

This appeal is from an order denying appellant's motion for new trial on the ground of newly discovered evidence. It is appropriate, therefore, to point out that "It is settled law that the overruling or granting of a motion for new trial on the ground of newly discovered evidence * * * is within the sound discretion of the trial judge, a discretion not reviewable in the absence of a clear showing that it has been abused, not used. *Royal Ins. Co. v. Eastham*, (C. C. A.) 71 F. 2d 385. It [is] for the District

Judge, in the exercise of that discretion, to say whether the newly discovered evidence [is] in law and in fact newly discovered, whether and to what extent it [is] material, and the possible effect it would have in changing the result on another trial." *Lake v. United States*, 84 F. 2d 711, 712 (C. C. A. 5, 1936).

Moreover, it has been held that in order to warrant the granting of such a motion, the following factors must exist: the evidence must be in fact newly discovered; facts must be alleged from which the court may infer diligence on the part of the movant; the evidence must not be merely cumulative or impeaching; it must be material to the issues involved; and it must be such that, on a new trial, it would probably produce an acquittal.

250 *Prisament et al. v. United States*, 96 F. 2d 865, 866 (C. C. A. 5, 1938). *See also Burnett v. United States*, U. S. App. D. C. (No. 9530, November 3, 1947).

The appellant was tried in March 1947, and convicted of first degree murder.

The testimony of all the witnesses, including appellant, was that a number of persons, among whom were included appellant and the deceased, one Lee Hunter, had gathered in the apartment of one Lurline Bost at 1718 8th Street, Northwest, Washington, D. C., during the afternoon of February 8, 1947. Some of those present, including appellant and the deceased, were engaged in a gambling game called 'blackjack', and there was considerable drinking of whiskey and beer. Five witnesses testified that the blackjack game had ended and that appellant began to play with Hunter's baby, that Hunter objected to appellant playing with the baby on the ground that he had been drinking, that appellant said, 'If you don't want me to play with your baby, I will take your wife and baby around to my house,' and that Hunter responded that if he did, he (Hunter) would kick his teeth down his throat. These five witnesses testified that appellant then withdrew from the apartment but returned in about ten or fifteen minutes with a pistol and immediately opened fire, killing Hunter with the first shot and firing three more shots in the general direction of other members of the party without hitting anyone. The testimony was that during the firing he said: 'Aint's nobody going to say they are going to kick my teeth down my throat and get away with it'. Afterwards he retreated to the hallway, fired two more shots through the door, and then ran out of the house.

Appellant took the stand in his own behalf. His version was that the blackjack game was still in progress, that he was banking it, that there were eight dollars in the pot, that Hunter won a dollar and demanded the whole pot, to which he objected.

251 Hunter advanced upon him with the threat to kick his

teeth down his throat. Also, that Hunter had his hand in his pocket and that appellant fearing for his life being forcibly in possession of a gun, shot and killed Hunter in self-defense. On cross-examination, appellant added the testimony that Hunter had threatened to kill him. Examined as to the other shots which he had fired at random, appellant pleaded forgetfulness and stated that he "must have got nervous." Statement of Facts in *Griffin v. United States*, U. S. App. D. C., 164 F. 2d 963.

In support of appellant's testimony that he had shot in self-defense, there was placed in evidence, by the defense, a photograph showing the deceased lying dead, with his right hand in the right-hand pocket of his trousers. (R. 95-98).*

The decision of the lower court was affirmed by this Court on December 8, 1947. Petition for certiorari to the Supreme Court of the United States was filed and denied on March 15, 1948. Petition for executive clemency was then filed and denied by the President on June 4, 1948. Execution is set for June 11, 1948.

On May 7, 1948, a motion for a new trial was filed on the grounds of newly discovered evidence, the principal grounds alleged being (1) that at the time of the trial the Government had in its "possession evidence that the deceased Lee Hunter at the time of the killing had an open knife *in his hand* with which he was attacking or was about to attack and assault the said Baxter Griffin;" (2) that, when the police arrived at the scene of the killing, there were playing cards scattered over the floor, which the photographs introduced at the trial failed to show. It was alleged that these items of evidence supported appellant's defense of self-defense.

252 At the hearing on said motion, on May 21 and May 25, 1948, the evidence showed that the deceased did not have an open knife in his hand with which he was attacking, or was about to attack the appellant, as alleged in the motion. Four police officers, a deputy coroner, and a morgue attendant all testified to the effect that when they arrived on the scene of the shooting, the deceased was laying near the south wall of the room on his back with his right hand in the right hand pocket of his trousers; that, when this hand was removed from deceased's pocket, it clasped a deck, or part of a deck of playing cards. (Transcript of new trial hearing, Vol. 1, p. 16-17, Vol. 2, pp. 12, 223, 31, 35 and 51-52). The morgue attendant, Joseph Small, testified that it was he who removed the deceased's hand from his pocket. (Vol. 2, p. 52); that, after he removed deceased's hand, which held the cards, he (the morgue attendant) put his hand back into the deceased's pocket and

* Page references indicated by R. are to the original record filed in this Court, as distinguished from the transcript of the hearing on Motion for New Trial.

took out an open knife (Vol. 2, p. 54). This knife was described by Detective Sergeant Walter B. Vogelsang, of the Homicide Squad, Metropolitan Police Department, chief investigating officer in the case, as a small black pen knife with one blade broken off and the other blade open (Vol. 1, p. 18). The knife was identified by this officer (Vol. 2, p. 5) and also by Detective Sergeant Albert L. Embrey of the Homicide Squad (Vol. 2, p. 23) and placed in evidence (Vol. 2, p. 5).

With regard to the allegation of the motion that playing cards were scattered over the floor when the police arrived on the scene of the killing, the evidence showed that the only cards on the floor were those which had fallen from the hand of the deceased after it was removed from his pocket by the morgue attendant (Vol. 1, p. 18; Vol. 2, pp. 12, 15, 23, 31-32, 37, 45, 52, 55). These cards were pictured in one of the photographs, Defense Exhibit No. 2 or 3 (Vol. 1, p. 19; Vol. 2, pp. 10, 27, 57-58).

253 The Court in denying the motion for a new trial, said, in part (Vol. 2, pp. 63-65):

"The defendant testified at the trial in his own behalf that the deceased made a menacing gesture, or what amounted to a menacing gesture, in the defendant's direction. This gesture consisted of the deceased putting his right hand in his trousers pocket and coming in the direction of the defendant. It now appears that it is made the basis for this application, that the deceased had an open pocket knife in his pocket at the time he made the menacing gesture. It does not appear, however, that he had withdrawn the knife from his pocket and it does not appear that the defendant knew that the deceased carried an open pocket knife at the time. Moreover, the open pocket knife was not in the hands of the deceased, when the hand of the deceased was taken from his pocket. A number of playing cards was found in it and further search revealed the knife in his pocket, apparently lying loose.

"The court is unable to perceive that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case. The question is whether the defendant shot in self-defense. All that he knew was that deceased made to the defendant what seemed to be a menacing suggestion; namely, that the deceased put his hand in his right-hand trousers pocket. Moreover, it appears affirmatively that the deceased did not grab the knife but had a number of playing cards in his pocket. The knife was lying in his pocket loose. The question whether a person is justified in attacking an assailant in self-defense must be determined by the facts which were presented to the person who pleads self-defense. He did not know, it appears, that the deceased had an open knife in his pocket, and therefore its existence is irrelevant.

254 The second basis for the motion is additional testimony tending to show that a number of playing cards were strewn on the floor of the room in which the shooting took place. Now, witnesses produced in support of this contention were the same witnesses who testified at the trial, so there is nothing newly discovered in that respect. Moreover, that is a circumstance which does not appear to the Court to be of any substantial importance. The fact that a card game had taken place is not disputed. Whether it was still in progress or whether it had ceased is not very important, so far as the Court views the issues of this case. Moreover, the fact that there were cards on the floor would not necessarily establish that the game was still in progress. The Court realizes the importance of the issues presented to it, but verdicts of juries must not be lightly set aside. The Court feels that it would be acting improvidently if it granted a new trial on the basis of the facts here presented. The Court felt that these contentions should be examined exhaustively, and this has been done. The motion for a new trial is denied.

Motion for a further stay of execution was made and denied by the District Court on June 4, 1948.

It is respectfully submitted that the issues raised by appellant's motion for a new trial were fully explored in the court below and that the disposition made of them by the trial court was manifestly correct. It seems clear, applying the principles applicable to appellant's motion, that no showing has been made of abuse of discretion by the trial court; that the motion accordingly was properly denied; and that this appeal should be dismissed as frivolous.

/s/ GEORGE MORRIS FAY,
United States Attorney.

/s/ GRACE B. STILES,
Assistant United States Attorney.

/s/ SIDNEY S. SACHS,
Assistant United States Attorney.

255 *Certificate of Service*

I hereby certify that service of the foregoing Motion to Dismiss Appeal was made by hand on Hans Nathan and John Holzworth, attorneys for appellant, this 9th day of June, 1948.

/s/ SIDNEY S. SACHS,
Assistant United States Attorney.

256 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Opposition to Motion to Dismiss Appeal

Filed June 14, 1948

The appellant by his attorneys John M. Holsworth, Hans Nathan and Austin P. Fickley, appear herein in opposition to the Motion to dismiss the appeal, from the Order denying a motion for a new trial.

In support thereof appellant's attorneys and counsel show that appellant's counsel, John M. Holsworth, was retained in behalf of appellant within the past month and counsel Hans Nathan following the appearance of John M. Holsworth. That the newly discovered evidence consists in the main of the fact that the deceased, Lee Hunter, had in his possession and in his right hand pants pocket at the time of the shooting an open bladed knife which was in his hand in his pants pocket and for for which he was reaching anad with which he was advancing on the appellant. At the same time making a threat to kill or do the appellant serious physical injury. Also that in said same pocket there were several playing cards which he had been using in the card game just prior to the shooting and also that at the time of the shooting or very shortly thereafter playing cards were found loose and scattered on
the floor. That there was no evidence of the existence of
257 the knife on the person of the deceased or in his hand or in his pocket at the time or on the trial. Also that there was no evidence on the trial that any playing cards were in the possession of the deceased or on the floor shortly after the shooting. The hearings on the Motion for a new trial disclosed that the U. S. Trial Attorney did, however, have knowledge of such facts and the evidence in support thereof, including a photograph taken on the scene a few minutes after the shooting which showed the cards removed from deceased's pocket but that the U. S. Attorney in possession of such photograph showing such facts suppressed the the same deliberately on the trial. Appellant's attorneys used diligence in the discovery of such evidence as the affidavits on the Motion and the testimony of witnesses on the hearings disclosed. Such evidence was not cumulative but entirely new evidence of a new character. Nor was such evidence impeaching of any similar evidence except in so far that it indicated perjurous testimony on the part of the Government's witnesses on the trial. Such evidence was so material as to hardly need argument. It was material on the question of appellant's defense of self-defense, and directly supported his version of the shooting which was diametrically different from the Government's witnesses version. Such

evidence was such that on a new trial it would probably produce either an acquittal or at a lesser verdict of homicide than First Degree Murder. In support of such claims appellant will herein cite ruling case authorities. Appellant attaches hereto and makes a part hereof a synopsis of the testimony of the eight witnesses called on the hearing in support of the Motion, including four police officers, Cox, Denny, Miller and Wyatt, none of whom were called as witnesses on the trial but all of whom were on the scene within a few minutes of the shooting and who took part in the investigation and in addition thereto, Joseph Spoll, an employee of the District Morgue for many years and familiar with investigations in homicide cases.

258 In the first paragraph of Page 4, of the Government's Motion to Dismiss the Appeal the U. S. Attorney states that "the evidence showed that the deceased did not have an open knife in his hand." As indicated in the testimony, it would be difficult not draw this inference in view of the conflict of testimony of those present at the time the hand was withdrawn. The most probable and logical inference would be that he did have the open knife in his hand, otherwise there would be no logical or probable reason for the blade having been open. In its efforts to indicate that the knife was not in deceased's hand the Government endeavored to show that there were cards in his hand when it was withdrawn but the testimony of the police officers was so conflicting as to how many cards there were in his hand destroys any value to their testimony on this point. But even assuming that the knife was not in the deceased's hands the fact that it was open in his pocket in which his hand had been inserted at the time of the shooting made it clearly material and vital.

In the last paragraph on Page 4 of the Government's motion the U. S. Attorney states that "the evidence showed that the only cards on the floor were those which had fallen from the hand of the deceased after it was removed from his pocket by the morgue attendant." A careful reading of the testimony will show that this statement is not true and that there was definite testimony that cards were scattered on the floor before the hand was removed.

In any event there was no disputing the fact that the deceased had some playing cards in his right hand pants pocket and several of the witnesses testified that they were few in number. Apparently the cards with which the deceased was actually playing at the time of the shooting. It will be recalled that on the trial the Government's witnesses all testified that the card game had

259 been over for some time a considerable time before the shooting occurred but that the appellant claimed that the game was in progress at the time of the shooting. Therefore the evidence and testimony on the hearings was strongly to corroborate

the appellant's version, and to cast the strongest doubt on the truth of the Government's witnesses.

The importance and relevancy and materiality of evidence as to what was in the deceased's hand inserted in his right hand pocket was shown by the testimony of Detective Sergeant Embrey of the Homicide Squad when he testified in the last lines of Page 24, of Volume 2 as follows:

> "Q. *Did any of the cards fall from his hand?*
>
> A. *I do not know whether they did or not—I mean his hand was taken from his pocket. I was anxious to know what was in that hand, and it was cards.*
>
> "Q. *Where was the open knife?*
>
> A. *It was in his pants pocket. Small removed his hand from his pocket and searched his pocket completely and handed me the knife.*"

Here is conclusive undebatable proof of the vital importance of this evidence, coming from a long experienced police officer alert to learn the cause, manner, and circumstances of the shooting, and it was suppressed with the U. S. Trial Attorney's knowledge. A further indication of the importance of testimony as to what was in the hand of the deceased is indicated by the fact which an examination of the trial minutes will show that the trial U. S. Attorney asked each of the Government's witnesses whether they saw anything in the defendant's hands or whether he had anything in his hands and elicited from them an answer in the negative. Furthermore, in the U. S. Trial Attorney's summation to the jury she stressed this point and said "The defendant wants you to believe that he thought or believed that the deceased had
260 something in his hand which was in his pocket when he advanced on the appellant or defendant." And at that very time in answering such questions eliciting such answers and making such summation she knew and suppressed the fact that he had an open knife in such pocket and in all probabilities clasped in his hand.

While the U. S. Attorney cites precedent cases on the general law applicable to newly discovered evidence, he does not attempt to cite any case law precidents indicating that a weapon in the possession of a deceased killed under such circumstances or in or about his hand but which was not *visible* or actually known by the accused was in the possession of the deceased as *incompetent, immaterial* or *irrelevant evidence*. Apparently the reason for such omission is the fact that standard authorities such as Corpus Jurus, CYC and Wharton's "Criminal Evidence" state that such evidence is relevant and cites precedent cases in support thereof.

The appellant cites the following authorities:

"Wharton's Criminal Evidence" 11th edition, Vol. 1 at page 332.

"The clearly settled rule is that the accused is justified in acting upon the apparent necessity and not the real necessity; and in such case, he has the right to act on the appearance of things as they would appear to an ordinary, reasonable and prudent person."

Owens v. U. S. 120 F. 279.
Uhl v. Park, 5 Park Criminal Reports 410.

Hence where the plea is self-defense, it is revelant to sustain that plea by giving in evidence all circumstances under which the homicide occurred and which would have effected the accused in his actions or in his apprehensions of danger or which would tend to show the attitude of the deceased. (Page 440.)

Derrick v. State, 92 Ark. 237, 122 SW 506.
Gedye v. People, 170 Ill. 284, 48 NE 487.
People v. Governale, 193 NY 581.

261 Quoting further from Wharton's Criminal Evidence:

"The fact that the deceased was in the habit of going armed or bore the reputation of being habitually armed should be admitted in evidence even though the fact was not known to the accused as it would tend to corroborate his story. (Page 444.)

Elleson v. State, 42 Texas Appeals 557.
Lilly v. State, 20 Texas Appeals 1.
State v. Cather, 121 Iowa 106.

"Thus it has been held that evidence tending to show that deceased was armed with a pistol at the time of the homicide is relevant in corroboratiton of accused's testimony that deceased made a motion as though to draw a weapon. (Page 445.)

Lilly v. State, 20 Texas Appeal 1.

"As relevant to the plea that the accused acted under a well-grounded apprehension that he was about to lose his life, or suffer serious bodily injury from the deceased, testimony is admissible to show that deceased was armed or that he attempted to use deadly weapons. (Page 445.)

Naughton v. State, 116 Alabama 463.

"Where the evidence showed the possession of a knife by deceased a short time before the homicide it is a relevant circumstance for the consideration of the jury. (Page 446).

Holler v. State, 37 Ind. 57.

"Where an examination was made of the body of the deceased immediately following the homicide and no weapon was found on it, that fact is admissible to show the deceased was not armed during the difficulty (Page 447).

Dwyer v. State, 139 Alabama 117.

(Of course, the converse of that rule or law would be that
262 a weapon was found on the body of the deceased, in this case Lee Hunter, immediately following the homicide.)

And generally the prosecution on rebuttal may introduce testimony showing that the deceased was not armed at the time of the affray; that he did not have the kind of weapon that the accused claimed and that he did not use any weapon which he had. (Page 447.)

People v. Powell, 87 Cal. 348.
State v. Reed, 137 Mo. 125.
Williams v. State, 30 Tex. Appeals 429.
State v. Satlin, 19 Wash. 57.

Also the following cases are cited with a brief statement from the head note or the substance of the holding.

Reynolds v. State of Georgia.
1 Georgia Reports 222.

Possession of pistols by the deceased and found on the ground where he fell after being shot are competent without proof that the accused had knowledge of it.

Holler v. State, 37 Ind. 57.

Held that evidence of possession of a knife by the deceased a short time before the occurrence which resulted in his death, was proper for the consideration of the jury.

Lilly v. State, 20 Texas Appeals 1.

Held that it was pertinent evidence that a pistol was found in deceased's coat when accused had testified that deceased had reached towards his pocket as if to get a weapon. (A ruling and authoritative case cited in corpus juris and CYC is Johnson v. Commonwealth, 222 Southwest 106 (Court of Appeals, Kentucky, 1920)). The head note reads as follows:

"While Courts are somewhat reluctant to grant a new trial for newly discovered evidence they will grant a new trial for such evidence if its materiality and probable effect are such that a manifest injustice would be committed to disallow a new trial.

263 ALSO,

"While a new trial will not be granted as a general rule to accused for newly discovered evidence which is cumulative only it will be granted when the evidence though somewhat cumulative is of so controlling a character that it would *possibly* change the verdict.

ALSO,

"Where the newly discovered evidence though insufficient to establish a possibility that accused would be acquitted on a new trial, is sufficient to make it probable that a verdict for a lesser degree of homicide than murder in the first degree would be rendered, it is sufficient to require a new trial after verdict of first degree murder fixing the penalty at death.

ALSO,

"If the newly discovered testimony is material upon any vital issue in the case, and it is otherwise admissible the fact that it is not directed to the establishment of the defendant's innocence of all crime will not cure the *error* in refusing to sustain the motion for a new trial therefore, if the newly discovered evidence is directed to an issue which if established would reduce the time as well as lessen the punishment inflicted. The question of supreme interest to a defendant in a criminal prosecution is first to establish his innocence of any crime, but if he should be unable to do that, he is next interested in reducing his offense to the lowest one for which he could be convicted under the indictment and in capital cases the one is about as much importance to him as the other." • • •

• • • • • • •

Thus, in Corpus Jurus, Volume 16, Page 1208, the text says:

"Where newly discovered evidence will probably change the result to a verdict more favorable to the defendant, a new trial should be granted.

Crouch v. Commonwealth, 189 SW 430.
Brooks v. Commonwealth, 137 SW 867.

In the same volume of Corpus Jurus, Page 1209, in speaking of the rule with reference to capital cases, it is said:

264 "In a capital case even a grave doubt created by the newly discovered evidence may in the interest of justice require a new trial. Where the new evidence is not alone sufficient to require a new trial, nevertheless it may be considered in connection with other errors and irregularities on the trial as bearing on a defendant's right to a new trial."

In this connection appellant respectfully contends that the fact that the new evidence was deliberately suppressed by the U. S. Attorney on the trial was an irregularity of the gravest kind and should lend support to the motion for a new trial on the ground of newly discovered evidence.

In further reference to Lilly v. State, 20 Texas Court of Appeals 1, the Court held that the evidence was pertinent because the defendant had stated that before he had advanced and seized the pole he saw the deceased throw his hand behind him, as he supposed, to draw a knife. It was held that if instead of a knife deceased attempted to draw or did draw a pistol it would nevertheless have strongly tended to corroborate the statement of defendant that he saw the defendant throw his hand behind him as if to draw a deadly weapon.

The U. S. Attorney as already stated, cited no precedent to the effect that the fact that the deceased, Lee Hunter, had an open knife in his pocket in which his hand was inserted, was not relevant evidence because the petitioner appellant, Baxter Griffin did not see the knife or did not know that Lee Hunter had it at hand in his pocket, and he depends almost entirely in support of such contention on the Court's statement of reason for denying the motion for a new trial set forth on pages 5 and 6 of his motion and
265 also on page 62 to 65 of Volume 2 of the Hearing.

It is respectfully submitted that the foregoing cases and citations show that the Justice in the lower Court was gravely in error in his conception of the law and the relevancy of this testimony. There is no question about the reason assigned by such Court. At page 65 he says:

> "The Court is unable to present that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case."

Also, later on, at the bottom of Page 64 the lower Court stated:

> "He did not know, it appears, that the deceased had an open knife in his pocket and therefore its existence is irrelevant."

As to the playing cards being on the floor or in the pocket of the deceased the Court stated at the top of Page 65:

> "Now witnesses produced in support of the contention were the same witnesses who testified at the trial so there is nothing newly discovered in that respect."

The Court was in error in this statement probably unwittingly because there were five new witnesses never called on the trial who testified that there were cards in evidence, either in Lee Hunter's pocket or scattered on the floor. These witnesses were the four

officers, Wyatt, Cox, Denny and Miller who were on the scene within a few minutes and also Joseph Small, the morgue attendant. Further, the lower Court said

> "Whether it (the card game) was still in progress or whether it had ceased is not very important so far as the court views the issues of this case."

The Government's contention on the trial as testified to by its witnesses was that the card game had been over quite a long time before the shooting occurred. The appellant's testimony and contention was that the card game was still in progress and the cause of the argument at the very time of the shooting. Either
266 one or the other was true or false. Therefore the mute and undeniable and suppressed evidence of the cards in Lee Hunter's pocket in all probability the hand with which he was playing and the cards on the floor would strongly and indisputably corroborate appellant's version of the occurrence and shooting, and throw the strongest doubt on the accuracy or truth of the Government's witnesses. And therefore, material and relative.

Referring back to the cases cited by the Government, on the top of Page 2 of its motion, *Prisament et al.* v. *United States,* 96 F. 2d 865, 866 (C. C. A. 5, 1938). *Burnett* v. *United States,* U. S. App. D. C. (No. 9530, November 3, 1947), such cases being cited in support of the contention that the Court did not abuse his discretion in denying the motion for a new trial, these cases are clearly distinguished from the instant case. In the first case the so-called newly discovered evidence consisted of cumulative alibi evidence part of which was clearly immaterial while in the Burnett case before this Honorable Court the alleged newly discovered evidence consisted of the fact that police officers were allegedly aware of the perpetrators of that part of the crime of which the appellant was acquitted. Furthermore, neither case was a capitol case in which the law is different as indicated in Johnson v. Commonwealth referred to at length above, and it is suggested to the Court that in an appeal of this type the factual situation is of greatest importance in considering precedent cases.

The facts show that the police were most negligent and incompetent in their investigation and observations at the scene of the shooting immediately thereafter. As an examination of the synopsis of their testimony will show, hardly any two of them agree, on many material facts. Certainly a man should not be put to death on the evidence from such incompetent sources and this coupled with the highly reprehensible conduct of the U. S. Trial Attorney in deliberately suppressing vital evidence to bring about a
267 First Degree Death Sentence verdict.

There are many facts and circumstances set forth in the transcript of the trial which is a part of the record on this appeal and which are in conflict with the testimony given on the hearings, and which brevity prevents being referred to on this opposition to the motion. Also not to be overlooked is the fact which will appear by reading of the trial transcript that the appellant was not properly and adequately represented by counsel.

In view of all the above, counsel respectfully requests and urges that the Court hear argument on this Motion. It is respectfully submitted that there are abundant reasons why a motion for a new trial should be granted and that all the requirements for the granting of a motion for a new trial are present in this case.

Counsel also refers to and makes a part of this brief the arguments of Mr. Hays before the lower court shown on the hearing transcript.

Respectfully submitted,

JOHN M. HOLZWORTH,
HANS NATHAN,
AUSTIN P. FICKLEY,
Attorneys for Appellant.

June 14, 1948

Copy received 6-14-48

LEDNEY & LOCHS,
Asst. U. S. Attorneys.

268 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Synopsis of Witnesses' Testimony in Hearings in Motion for a New Trial

Nine witnesses were called on such hearings whose testimony is shown in the transcript consisting of 90 pages. For the convenience of the Court, the following brief synopsis has been prepared.

1. Vogelsang, Walter B. Sergeant (shown at pages 16 to 19 inclusive in Volume 1 and at page 4 in Volume 2).

(a) Deceased Hunter's right hand taken out of right pants pocket while Vogensang was there.

2. (b) Such hand clasped around a deck of cards.

(c) When hand removed playing cards stayed in his hand.
(d) Also knife with open blade in same pocket.

(e) No cards on floor until after hand was removed from pocket.
(f) Some of cards fell to floor alongside body.
(g) Such search occurred ten minutes after his arrival.
(h) Officers Miller and Wyatt on scene before him.
(i) At no time saw any cards scattered on floor.
(j) Moving deceased hand around resulted in two cards falling on floor.

(k) Arrived about 7:45 and stated that Officers Wyatt and
269 Miller did not arrive there until about 8:00 o'clock. (Testimony in (k) given by Vogelsang on the second day he testified being different from testimony in (h) given on first day.)
(l) Officers Cox and Denny on scene when Vogelsang arrived.
(m) *Order of arrival of Officers.* First, Denny and Cox, then Sergeant Knabrey and Vogelsang, then Miller and Wyatt, then the police photographer. Coroner Rosenberg came shortly after 8:00 p. m.
(n) Second photograph of Hunter taken after right hand removed from pocket was supposed to show hand with cards in it *but photographs failed to catch that.*

2. Rosenberg, Richard M., Deputy Coroner (shown at page 11, volume 2).

(a) Deceased Hunter's right hand in pants pocket.
(b) Was present when such hand removed.
(c) *Some* playing cards in such hand.
(d) Saw nothing else removed. (Not the knife.)
(e) Does *not recall* cards scattered about floor.
(f) Either Joseph Small (morgue wagon employee) or myself removed the hand from pocket.
(g) Police photographer arrived after Rosenberg arrived.
(h) Just a few playing cards in deceased's hand when it was removed.

2. Wyatt, William J., Officer (page 14) (Volume 2).

(a) Officer Miller with him on arrival.
(b) Officers Denny and Cox there before them.
(c) Saw a few playing cards near the body on arrival, there were some cards there on the floor.
(d) Believe deceased's hand out of pocket when he arrived, but not sure.
(e) Did not know whether police photographer was there before he arrived or not.
270 (f) Was there when all photographs were taken.
(g) Couldn't say when he saw the playing cards.
(h) Couldn't recollect anyone taking deceased's hand out of his pocket.

(i) Does not remember seeing the knife.
(j) Didn't think he helped move the body.
(k) Couldn't say whether card table was turned over.

3. Embrey, Albert L., Sergeant (Testimony Page 24, Volume 2).

(a) Went to scene with Sergeant Vogelsang.
(b) Hunter's hand in right pants pocket.
(c) There when photographs taken.
(d) Present when hand removed.
(e) A deck of cards in such hand.
(f) Pocket knife also in right pants pocket.
(g) Did not see any other cards scattered on floor or elsewhere.
(h) Didn't recall seeing any card container.
(i) Cards were not in container.
(j) Joe Small removed hand from pocket and handed Embrey knife which he gave Sergeant Vogelsang. At least four or five times (five or six cards) removed from pocket.
(k) Does not know whether any cards fell from hand on removal.
(l) Was anxious to know what was in Hunter's hand and it was playing cards.
(m) Open knife in same pocket.
(n) Does not know if body was moved before Joe Small took out hand from pocket.
(o) Small moved the body for searching.
(p) Photograph taken with cards at Hunter's elbow.
271 (q) Did not order a picture with knife displayed.
(r) Doesn't know what happened to playing cards taken on the scene.
(s) Gave Vogelsang the knife.

4. Cox; Preston M., Officer (Page 31, vol. 2).

(a) Arrived with Officer Denny.
(b) Were first on scene.
(c) Hunter's hand in right pants pocket.
(d) Didn't observe cards about room.
(e) Present when hand was removed.
(f) Deck of cards was in hand.
(g) Observed nothing else removed from pocket (not the knife).
(h) Joe Small removed Hunter's hand from pocket.
(i) Deck of cards not in container.
(j) Saw no knife.
(k) Saw what Joe Small took from Hunter's pocket.
(l) No cards dislodged from pack—seems that full pack was in Hunter's hand.
(m) Photograph taken in that posture (i.e. with playing cards in Hunter's hand.

5. Denny, Larry V., Officer (Page 35, Vol. 2)

(a) He and Officer Cox first persons on scene.
(b) Hunter's hand in his pocket.
(c) Testified at Coroner's hearing.
(d) Saw no cards on arrival except a cardboard playing card container on floor near table.
(e) Not present when hand removed.
(f) Deck of cards was on the floor (page 38)
(g) Deck of cards was in the container.
(h) Saw no knife.
(i) Not there when Joe Small removed Hunter's hand.

272 6. Miller, Luther, Officer. (Page 4, Volume 2)

(a) Arrived on scene with Officer Wyatt.
(b) Remembers nothing about position of Hunter's hand.
(c) Saw some playing cards—can't recall just how they were on the floor.
(d) Told Hoisworth there were playing cards on the floor.
(e) Does not recall whether cards were scattered.
(f) Have impression of cards being on floor.
(g) Does not remember about photographs being taken.
(k) Can't estimate how many cards he saw.
(l) Can't say whether cards were loose or in the container.

7. Small, Joseph, Coroner's employee. (Page 50 Volume 2)

(a) Hunter's right hand was in right pants pocket.
(b) He removed Hunter's hand.
(c) Playing cards in the hand.
(d) Also open knife in the pocket.
(e) When cards removed from pocket a couple fell on floor.
(f) Saw no other cards.
(g) Did not count the cards.
(h) There were a good few cards.
(i) There were five or six cards.
(j) Knife was open.
(k) Told Holsworth previously there were cards on floor.
(l) Yes, they were scattered.
(m) Were from where I pulled them out of pocket.

273 8. Cornwell, Eye Witness (Page 57, Volume 2).

(a) Previously told Holsworth "I saw the playing cards in the photographs produced down in Court" (no photographs were produced on the trial showing playing cards on the scene but one such photograph was produced by the District Attorney on the hearings for Motion for New Trial.

274 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 9882, April Term, 1948

BAXTER GRIFFIN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: Edgerton, Clark and Groner, J.J.

Order Denying Motion for Stay of Execution and Dismissing Appeal

Filed June 16, 1948

On consideration of appellant's motion for stay of execution herein and of appellee's objections thereto, and of appellee's motion to dismiss this appeal, and of appellant's opposition thereto, it is

ORDERED by the Court that the motion for stay of execution herein be, and it is hereby, denied, and it is

FURTHER ORDERED by the Court that this appeal be, and it is hereby, dismissed.

Per curiam

Dated June 16, 1948.

275 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Order Granting Motion as to Record

Filed Sept. 30, 1948

On consideration of appellee's motion to authorize the Clerk to use the original transcript of record herein in preparing the record for filing in the Supreme Court in connection with appellant's petition for allowance of a writ of certiorari, it is

ORDERED by the Court that the motion be, and it is hereby, granted.

Per curiam.

Dated September 30, 1948.

276 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Designation of Record

Filed Sept. 23, 1948

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Transcript of record in District Court, including transcript of hearing on motion for new trial (in two volumes), held on May 21 and 25, 1948.
2. Appellee's motion to dismiss appeal.
3. Appellant's opposition to motion to dismiss appeal.
4. Per curiam order denying motion for stay of execution and dismissing appeal.
5. This designation.
6. Clerk's certificate.

GEORGE MORRIS FAY,
U. S. Attorney

LEDNEY & LOCHS,
Assistant United States Attorney,
Attorneys for Appellee.

Service of the foregoing motion was made on September 22, 1948, by mailing copy of same, first class mail, to Baxter Griffin, District Jail, Washington, D. C., and also to John M. Holzworth, his attorney, at 125 B St., S. E., Washington, D. C., his last known address.

277 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Clerk's Certificate

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 144, both inclusive, constitute the original transcript of record; that pages numbered 145 to 241, both inclusive, constitute a true copy of the official court reporter's transcript of proceedings on May 21, 1948, and May 25, 1948, on motion for new trial on newly discovered evidence in the District Court of the United States for the District of Columbia in Criminal Case No. 246-47, United States of America v. Griffin; that

pages 242 to 248, both inclusive, constitute the original exhibits marked Government's Exhibits Nos. 1, 2 and 3 and defendant's Exhibits 2 and 3, transmitted from said District Court in said cause; and that pages numbered from 249 to 276, both inclusive, constitute a true copy of the proceedings of the said Court of Appeals as designated by counsel for appellee, in the case of:

BAXTER GRIFFIN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 9882, April Term, 1948

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this thirtieth day of September, A. D. 1948.

(SEAL)

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

278 SUPREME COURT OF THE UNITED STATES

No. 41, Misc. ——, October Term, 1948.

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Order granting motion for leave to proceed *in forma pauperis;* granting petition for writ of certiorari, etc., November 15, 1948.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 417.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

417

No. 417

BAXTER GRIFFIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

JAMES R. REYNOLDS,
FRANCIS J. KELLY,
J. LOUIS O'CONNOR,
Counsel for Petitioner.

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STATUTE CITED

Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, c. 229, para. 1, 43 Stat. 938 (U.S.C., Title 28, para. 347-a)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 417

BAXTER GRIFFIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeal from the District Court of the United States for the District of Columbia was rendered in a per curiam decision and is not reported (R. 134). The opinion of District Judge Holtzoff denying petitioner's motion for a new trial on the ground of newly discovered evidence is contained in the Record at Pages 115 to 116.

Jurisdiction

The judgment of the circuit court of appeals dismissing petitioner's appeal from the order of the District Court was entered June 16, 1948 (R. 134). The petition for a

writ of certiorari was filed July 8, 1948. An order allowing certiorari was entered November 15, 1948 (R. 136). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, para. 1, 43 Stat. 938 (U. S. C., Title 28, para. 347 a).

Statement of the Case

On March 3, 1947 petitioner was found guilty by a jury in the United States District Court for the District of Columbia of the crime of first degree murder. On April 18, 1947 a motion for a new trial was overruled and petitioner was sentenced to death. On December 8, 1947 the judgment of the lower court was affirmed by the United States Court of Appeals for the District of Columbia Circuit (*Griffin* v. *United States*, 164 F. 2d 903). This Court denied certiorari on March 15, 1948 (333 U. S. 857). Thereafter, on May 7, 1948 petitioner filed a motion for a new trial on the ground of newly discovered evidence which, after hearing, was denied by the District Court on May 25, 1948. The appeal from the denial of this motion was dismissed on motion of the United States on June 16, 1948. On November 15, 1948 this Court granted a petition for a writ of certiorari.

Petitioner's discussion of the case will be confined strictly to the matters brought to light on the hearing on the motion for a new trial except where it is necessary to state what happened at the original trial in support of his argument that a new trial should be granted.

The proceedings in the original trial deemed pertinent to the issue now before this Court may best be set out by quoting from the opinion of the United States Court of Appeals for the District of Columbia Circuit in the case of *Griffin* v. *United States* (164 F. 2d 903):

> "The testimony of all the witnesses, including appellant, was that a number of persons, among whom were

included appellant and the deceased, one Lee Hunter, had gathered in the apartment of one Lurline Bost at 1718 8th Street, Northwest, Washington, D. C., during the afternoon of February 8, 1947. Some of those present, including appellant and the deceased, were engaged in a gambling game called "blackjack," and there was considerable drinking of whiskey and beer. Five witnesses testified that the blackjack game had ended and that appellant began to play with Hunter's baby, that Hunter objected to appellant playing with the baby on the ground that he had been drinking, that appellant said, "If you don't want me to play with your baby, I will take your wife and baby around to my house," and that Hunter responded that if he did, he (Hunter) would kick his teeth down his throat. These five witnesses testified that appellant then withdrew from the apartment but returned in about ten or fifteen minutes with a pistol and immediately opened fire, killing Hunter with the first shot and firing three more shots in the general direction of other members of the party without hitting anyone. The testimony was that during the firing he said: "Ain't nobody going to say they are going to kick my teeth down my throat and get away with it." Afterwards he retreated to the hallway, fired two more shots through the door, and then ran out of the house.

Appellant took the stand in his own behalf. His version was that the blackjack game was still in progress, that he was banking it, that there were eight dollars in the pot, that Hunter won a dollar and demanded the whole pot, to which he objected. Hunter advanced upon him with the threat to kick his teeth down his throat. Also, that Hunter had his hand in his pocket and that appellant thereupon, being fortuitously in possession of a gun, shot and killed Hunter in self-defense. On cross-examination, appellant added the testimony that Hunter had threatened to kill him."

It will be noted from a reading of the foregoing statement hat appellant testified that the shooting occurred in self

defense when deceased advanced upon appellant after demanding all the money in the pot. It is thus clearly apparent that whether or not the card game had ended as the Government witnesses testified or was still in progress as petitioner testified, was an issue vitally important to the defense. At the original trial there was no testimony with respect to the presence of playing cards. Subsequently, however, at the hearing on the motion for a new trial, testimony was adduced from various police officers which proved that the deceased had in his right hand (which right hand was in his right hand trousers pocket) some playing cards (R. 82, 92, 93, 94, 95, 96, 97, 100, 101, 107, 108, 111, 112). The testimony as to the *number* of playing cards which deceased was grasping varied with each of the witnesses who testified at the hearing and ran from a "few" cards to a deck of cards.

Furthermore, at the hearing on the motion for a new trial various police officers and a morgue attendant testified that there was in the right hand trousers pocket of deceased an open bladed knife, and that at the time deceased was examined (immediately after the shooting and death) he had his right hand in his right hand trousers pocket, and that this fact had been brought to the attention of the Assistant United States Attorney (R. 82, 88, 96, 97, 99, 108). At the same hearing the Assistant United States Attorney who had prosecuted the case made the following statement:

> "I would like to state that the prosecution did know there was an open knife in the pocket of the deceased, but I took the position that there was no evidence in the case that this knife was ever taken (by the deceased) from his pocket. Even by the defendant's own testimony, he testified the deceased came around the table toward him with his hand in his pocket. The defense put in evidence the photograph which * * * showed this deceased with his hand in his pocket.

I felt, just as Your Honor pointed out a while ago, if this fact of the knife had been raised it would not have been admissible. The man could have had a dozen knives in his pocket and unless it was shown that the defendant saw this knife or he was drawing out a knife or had a knife in his hand, that it would not have been admissible. That is the position I took. Certainly it was with no intention of suppressing any evidence which I felt was admissible." (R. 84, 85.)

Specification of Assigned Errors

(1) The lower courts erred in denying appellant's motion for a new trial on the ground of newly discovered evidence. For purposes of clarity this specification will be subdivided into

(a) The newly discovered evidence concerning the presence of an opened knife in the right hand pocket of deceased, and

(b) The presence of some playing cards in the right hand pocket of the deceased.

Summary of Argument

(1) If the evidence is actually "newly discovered" and admissible it is not for the Court to determine what its effect on the jury would have been, but it is a matter for a jury.

(2) A prosecuting attorney, especially in a first-degree murder case where a death sentence is mandatory on conviction, has the duty of bringing every fact at his disposal to the attention of the jury or to the attention of defense counsel. This includes not only facts indicative of defendant's guilt, but also any fact which might *possibly* be in defendant's favor or in his favor as to the degre of culpability with which he is charged.

(3). If the newly discovered evidence is such that reasonably prudent jurymen might differ as to whether or not it would raise a reasonable doubt as to the guilt of a defendant charged with first degree murder, a new trial should be granted.

ARGUMENT

I

If the evidence is actually "Newly Discovered" and admissible it is not for the Court to determine what its effect on the jury would have been, but it is a matter for a jury.

District Judge Holtzoff in overruling appellant's motion for a new trial in his oral opinion stated:

> "It now appears that it is made the basis for this application that the deceased had an open pocket knife in his pocket at the time he made the menacing gesture. It does not appear, however, that he had withdrawn the knife from his pocket and it does not appear that the defendant knew that the deceased carried an open pocket knife at the time. Moreover, the open pocket knife was not in the hand of the deceased, when the hand of the deceased was taken from his pocket. A number of playing cards was found in it and further search revealed the knife in his pocket, apparently lying loose.
>
> The Court is unable to perceive that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case." (R. 115.).

Although as previously stated, the United States Court of Appeals for the District of Columbia Circuit rendered no opinion in dismissing the appeal from Judge Holtzoff's denial of the motion, that Court did render a written opinion in Case No. 9904 in granting the Government's motion to

dismiss an appeal from an order denying a petition for a writ of *habeas corpus*. In that opinion the Court stated:

> "The present petition refers to the record of a recent hearing on a motion for a new trial on the ground of newly discovered evidence, which record was before this court on appeal in No. 9882, *Griffin v. United States*. That record shows that Hunter had, and the prosecutor knew he had, an open knife in his pocket but *not* in his hand. It shows that Hunter's hand was clasped around playing cards, so firmly that they stayed in his hand when it was removed from his pocket after his death. If the knife had been in his hand, as the petition says it was; or even if his hand had been empty, so that an inference might have been drawn that he was reaching for the knife; its presence would have given substantial support to appellant's story that Hunter threatened him. But since Hunter was neither holding nor reaching for the knife and, on the contrary, was firmly clutching playing cards, the fact that an open knife was readily available to him is strong evidence that he had no intention or thought of making a violent attack upon appellant. It therefore gives no support to appellant's contention that Hunter threatened him or appeared to do so. It even tends, in some degree, to refute that contention. Plainly, therefore, the prosecutor's course in not using the evidence of the open knife, while it may have been unwise, did not detract from the fairness of appellant's trial and is irrelevant in this proceeding."

It is submitted that, with all respect to the courts below, both courts have committed the judicial error of attempting to invade the province of the jury.

Both courts stress that the knife was not in the hand of the deceased when he was shot. There was no proof of this—the only proof is that *after* he was shot an examination showed his right hand to be clasping some playing cards in his pocket. Are judges, without the aid of medical testimony, to be permitted to speculate on the convulsive

effect of a gunshot wound? Maybe the knife *was* in deceased's hand at the time he was shot, but *after* the shot he convulsively released the knife and grabbed the cards. Certainly had the presence of the knife been made known to appellant's counsel at the time of trial, such an argument would not have been too far fetched to make to a jury. And what judge can say that such an argument might not have created a reasonable doubt in the mind of at least one juror, or what judge can say that the jury might not have returned a verdict of second-degree murder or perhaps manslaughter?

The Court's attention is directed to the case of *Cleary* v. *United States*, (163 F. 2d, 748 Ninth Cir.). This was an appeal from an order of the District Court denying a motion for a new trial on the ground of newly discovered evidence. The affidavits in support of the motion tended to show an alibi. The District Court denied the motion saying that "it appears the jury at the time of trial believed the competent testimony of the victim of defendant's alleged crime and did not believe defendant's story on the witness stand, and because the Court knows of no reason why a new jury at a second trial would not do the same thing as the first jury did.". The Circuit Court of Appeals, however, stated "It is obvious that if the evidence, so claimed to show the alibi, were actually newly discovered, it was a matter for the jury and not for the judge to consider its weight against the testimony of the complaining witness." (The Court affirmed the denial of the motion because it found that the evidence was not "newly discovered".)

In *Helwig* v. *United States* (162 F. 2d 837) the Petitioner was convicted of a violation of the Mann Act. A motion for a new trial on the ground of newly discovered evidence was filed and denied. The newly discovered evidence consisted of affidavits from two persons in Ohio who would

testify that Petitioner and prosecutrix had stated that the purpose in going from Ohio to Pennsylvania was to be married. The United States Court of Appeals, Sixth Circuit, stated

(1) That it did not appear that this evidence was "newly discovered" because it was available to Petitioner at the time of trial, but

(2) Since these persons were not called the verdict and sentence should be set aside and the case remanded for a new trial. The Court said:

> "It would seem to be clear, however, that this evidence, if it had been produced, would have had a material bearing upon the issue as to whether the interstate transportation had a dominant legitimate purpose. Of course, the jury might still have found that the transportation of the girl was for one of the condemned purposes, in view of all the circumstances including the previous relations of the parties, their subsequent conduct and the return of the girl to Ohio without any effort to accomplish a valid marriage. We are, of course, unable to say that the Jury would so have found, even though an intent to pursue sexual relations prior to marriage may still be in pursuit of an immoral purpose according to prevailing mores."

The Government in its Memorandum in opposition to the granting of the petition for certiorari cited numerous cases in support of its contention that a new trial, on the basis of newly discovered evidence, will be granted only if the evidence, among other things, is of such a nature that it would probably result in a verdict of acquittal. (Citing *Long* v. *U. S.*, 139 F. 2d 652; *Weiss* v. *U. S.*, 122 F. 2d 675; *Evans* v. *U. S.*, 122 F. 2d 461; *Wagner* v. *U. S.*, 118 F. 2d 801; *Prisament* v. *U. S.*, 96 U. S. 865 and *Johnson* v. *U. S.*, 32 F. 2d 127). It is significant, however, that only one of these cases in-

volves first-degree murder and that in all the cases the affidavits concerning newly discovered evidence were traversed by the Government. In the first-degree murder case (*Evans* v. *United States*) the newly discovered evidence was not only palpably a fabrication but of such a nature as to attempt to prove that death *might* have resulted from a cause different than that testified to by medical experts at the trial. And the testimony of the medical experts had been convincing beyond reason. In the other cases relied upon by the Government the newly discovered evidence was either merely of an impeaching nature, or of such dubious truth that the Government denied the authenticity of the new evidence. *In the instant case the Government admits that the evidence is newly discovered and that the Government knew of the evidence at the time of trial but did not disclose it either to the Court or to defense counsel.*

In *Arbuckle* v. *United States* (79 App. D. C. 282; 146 F. 2d 657) the United States Court of Appeals for the District of Columbia Circuit ordered a new trial in an embezzlement case when appellant had been placed on probation. The new evidence was available to defense counsel at the time of trial, but because illness caused a lack of time in preparation for trial the Court of Appeals treated the evidence as "newly discovered." The new evidence would merely impeach the testimony of the prosecuting witness. Arbuckle was on probation when the new trial was granted—this appellant is awaiting execution.

The Court's attention is directed to the following excerpt from *Hines* v. *Commonwealth* (136 Va. 728; 117 S. E. 843; 35 A. L. R. 431). "In a criminal case, to obtain a new trial, such new evidence must be of such a character as, on being considered with all the rest of the testimony, to leave a reasonable doubt as to the defendant's guilt or at least as

to his guilt within the degree of culpability of which the jury found him guilty."

The Assistant United States Attorney in charge of the prosecution of this case stated that she felt that the fact of the open knife in the pocket of deceased would not have been admissible as her reason for not disclosing such fact to the Court or defense counsel. Petitioner alleges that such evidence would clearly have been admissible, and to exclude this fact would have been judicial error. Clearly the fact was relevant to the issue of whether petitioner shot in self-defense or not. (Wharton's "Criminal Evidence," 11th Ed., Vol. 1, pp. 440-447 incl.) But aside from that, petitioner alleges that it would have been admissible to prove the violent character of deceased. If the general character of the deceased in a homicide case where the defense is self-defense is admissible (which it clearly is—See 64 A. L. R. 1029), then his frame of mind on the specific occasion should certainly be admissible. Why would the deceased be carrying an *open* knife in his pocket other than to have it ready for immediate use as a weapon? Many persons carry knives—only persons with criminal intent carry *open* knives.

H

A prosecuting attorney, especially in a first-degree murder case where a death sentence is mandatory on conviction, has the duty of bringing every fact at his disposal to the attention of the jury or to the attention of defense counsel. This includes not only facts indicative of defendant's guilt, but also any fact which might possibly be in defendant's favor or in his favor as to the degree of culpability with which he is charged.

So much has been said and written in legal treatises, opinions of courts and public addresses concerning the duty of Prosecuting Attorneys, and this Court is so familiar with

their duties that the argument on this point will be limited. Justice Sutherland in *Berger* v. *United States* (295 U. S. 78) stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and a very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

And in an opinion by Justice Rutledge, then a member of the United States Court of Appeals for the District of Columbia, in the case of *Jordan* v. *United States* (114 Fed. 2d, 599) he said:

> "—the prosecutor not only is not allowed to suppress evidence vital to the accused, but is required in certain circumstances to disclose such evidence to him or to the court in order to avoid what would amount in practical effect to concealment."

The Supreme Court of Michigan in *People* v. *Vick* (235 Mich. 475) reaffirmed its previous position stated in *People* v. *Swetland* (77 Mich. 53) as follows:

> "It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so."

Petitioner's present counsel, far from charging that the Assistant United States Attorney acted in bad faith and actively suppressed material evidence, wish to state that her frank statement made at the hearing on the motion for a new trial that she knew of the presence of the open knife at the time of trial and her reasons for non-disclosure bespeak for her the utmost candor and honesty. But it is respectfully submitted that she was in error, and the result of her error is that a person has been convicted of first-degree murder who might otherwise not have been. Perhaps she was, and still is, completely convinced of the guilt of petitioner, but her duty was to convince the jury of such guilt beyond a reasonable doubt with a full disclosure of *all* the facts, and not merely to convince herself or the Trial Judge.

The issue in this appeal is not the guilt or innocence of the petitioner, but rather it is whether or not a full disclosure of the fact that deceased had "some" playing cards in his hand (indicating that the game had not ended as the Government witnesses testified), plus the fact that deceased had in his right-hand trousers pocket an *open* knife (indicative of his intent to have it ready for immediate use as a weapon) would have raised in the minds of the jury (or one single member thereof) a reasonable doubt as to his guilt in any degree or at least a reasonable doubt as to his guilt of murder in the first degree.

III

If the newly discovered evidence is such that reasonably prudent jurymen might differ as to whether or not it would raise a reasonable doubt as to the guilt of a defendant charged with first degree murder, a new trial should be granted.

At the trial of this case petitioner himself was the only witness for the defense. His version of the killing was in

direct contrast to that of the Government witnesses. The Government contended that the card game had ended, that an argument thereafter took place between petitioner and deceased, that deceased left the premises and returned in ten or fifteen minutes and shot deceased in cold blood. Petitioner's version was otherwise—he stated that the shooting occurred in self-defense when deceased advanced upon petitioner after trying to take all the money in the pot. Whether or not the game was in progress as petitioner contended or had been completed was a vital issue bearing on (1) the credibility of all witnesses, and (2) premeditation and deliberation. Would not the jury have been justified in finding that the game was still in progress had the jury known that deceased had some cards in his hand at the time he was shot? Judge Holtzoff in denying the motion for new trial stated:

> "The second basis for the motion is additional testimony tending to show that a number of playing cards were strewn on the floor of the room in which the shooting took place. Now witnesses produced in support of this contention were the same witnesses who testified at the trial, so there is nothing newly discovered in that respect. Moreover, that is a circumstance which does not appear to the Court to be of any substantial importance. The fact that a card game had taken place is not disputed. Whether it was still in progress or whether it had ceased is not very important, so far as the Court views the issues of this case. Moreover, the fact that there were cards on the floor would not necessarily establish that the game was still in progress." (R. 116).

Petitioner alleges this to be a glaring example of a court invading the province of the jury. Whether or not the game was in progress was of the utmost importance because the Government contended that the game was over,

and the petitioner testified that it was still in progress. If the jury had found that it was in progress they would have had to find that the Government witnesses were mistaken on this point, and possibly on others. Certainly the jury would have had to find that there was not a ten or fifteen minute period for deliberation, and probably would not have returned a verdict of first-degree murder. It is not for the Court to determine that whether or not the game was still in progress was unimportant. Perhaps it would make no difference to the Court—but it is for the jury to determine whether or not it was important. Apparently the matter assumed some importance in the mind of the Prosecuting Attorney because in her summation to the jury she stated:

> "The only question we are concerned with is did this occur at the time the card game was going on, or after it was over; or did the shooting occur in self-defense, or did it occur as alleged in the indictment, by premeditated and deliberate malice on the part of this defendant, * * * (T. 56).

The record indicates that the one photograph which should have portrayed some cards on the floor did not do so (R. 90) and defendant's counsel had no knowledge of it. So the evidence of the presence of cards in the pocket of the deceased was therefore newly discovered. This is a capital case, and *any* fact which would tend to lessen the degree of culpability should go to the jury for its deliberation. Certainly if reasonable men might differ as to the weight to be accorded this circumstance then that circumstance is a matter for the jury's determination.

This Court has stated on many occasions that it is better that one hundred guilty persons go free than that one innocent person be convicted. The argument now is not that petitioner is innocent, but that he should be granted a

new trial so that a jury may determine his guilt or innocence after reviewing all the evidence, including the presence of the open knife and the presence of the cards in decedent's hand. Both these facts were known to the Government and not to petitioner at the time of trial, and petitioner alleges that their non-disclosure is a violation of procedural due process.

This Court in recent years has decided many cases which tend to place around the accused even more safeguards than he formerly had. Petitioner alleges that, especially in a capital case, the proper administration of criminal justice demands that the Government make known to the jury *any* fact that could possibly cause a reasonable person to doubt the guilt of the accused. In the instant case there are two extremely important facts that not only could *possibly* affect the jury's decision but *in all probability* would have lessened the degree of petitioner's guilt.

Conclusion

For the reasons stated, judgment should be set aside and the case remanded with instructions to grant a new trial.

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No. 417

In the Supreme Court of the United States

OCTOBER TERM, 1948

BAXTER GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

Neither the District Court nor the Court of Appeals delivered a written opinion. The District Court's oral opinion appears at R. 115–116. The *per curiam* order of the Court of Appeals dismissing the appeal appears at R. 134.

JURISDICTION

The judgment of the Court of Appeals was entered June 16, 1948 (R. 134). The petition for a writ of certiorari was filed July 8, 1948, and was granted November 15, 1948 (R. 136). The jurisdiction of this Court rests on Section

240 (a) of the Judicial Code, as amended (now 28 U. S. C. 1254 (1)). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in the circumstances of this case, the District Court properly exercised its discretion in denying a motion for a new trial on the ground of newly discovered evidence.

STATEMENT

On March 28, 1947 (R. 2), following a jury trial in the District Court for the District of Columbia, petitioner was found guilty of murder in the first degree (R. 66), and on April 18, 1947 (R. 2), he was sentenced to the mandatory penalty of death by electrocution (D. C. Code, 1940 ed., § 22–2404). The conviction was affirmed on appeal, *Griffin* v. *United States*, 164 F. 2d 903 (C. A. D. C.), and this Court denied certiorari on March 15, 1948. 333 U. S. 857.

The present proceeding arose with the filing, on or about May 7, 1948, of a motion for a new trial on the ground of newly discovered evidence (see R. 67). In order, however, to understand the nature of the grounds urged in the motion, and to appraise the correctness of the order denying the motion, it is necessary to review the evidence for the Government and for the defense adduced at the original trial.

The Government's evidence at the trial may be summarized as follows:

Daisy McCullough testified that she and seven others, including petitioner and the deceased, Lee Hunter, attended a party at 1718 9th Street, N. W., Washington, D. C., on the evening of February 8, 1947 (R. 9–10, 14). She and petitioner and two of the others present started to play whist (R. 10). She said she was sure the game was whist, and not blackjack,[1] remarking that she did not know how to play blackjack (R. 12). After a while, they "stopped playing whist" and drank some whiskey and beer (R. 10). They "sat around and started talking" (R. 10). Then—

> * * * Baxter Griffin started playing with Lee Hunter's [the deceased's] baby. Lee Hunter told Baxter Griffin to put down the baby, because he had been drinking. Baxter Griffin said, "If you don't want me to play with your baby, I will take your wife and baby around to my house." Lee Hunter told him if he would do that, he would kick his teeth down his throat. Baxter Griffin got up, put on his overcoat, and said he was going home. He walks out the door and was gone about five or ten minutes. Then he comes back.

[1] The Court of Appeals, in its opinion affirming the conviction on the original appeal, stated that all the witnesses at the trial had testified that "a gambling game called 'blackjack'" had been in progress shortly before the fatal shooting (164 F. 2d 993). This, however, was clearly an inadvertent misstatement. The government witnesses testified that the game was whist (R. 10, 25, 28). Petitioner alone testified that the game was blackjack (R. 39).

There is a knock on the door. Lurline Bost opened the door. When she opened the door, she saw that it was Baxter Griffin. She turns to come back in the room. Just as she turned to come in the room, I heard a fire. I looked over in the corner and I saw Lee Hunter lying between the stove and the dresser.

Baxter Griffin said, "Ain't nobody going to say they are going to kick my teeth down my throat and get away with it." Then he looks over in the corner towards me and sees another boy. Henry Harritt was over there. And he turned the gun over there and fired over there.

By that time Henry Harritt had pushed me over in front of the door, and Esther [Taylor] was sitting on the sofa in front of the door and asked Baxter Griffin, "Please let me out with the baby," and "Don't hurt the baby." He told her to be quiet. She asked him again to let her out with the baby; and just as he said to be quiet, Baxter Griffin fired between her legs, down between her heels, on the floor.

Then Henry Harritt was behind me and pushed me toward the door. And he fell on his knees, and then somebody bolted the door down at the bottom, and someone turned out the light. And then we all started scrambling to try to get out the window. Just then I heard two more shots come through the door. (R. 10–11.)

Miss McCullough further testified that when petitioner fired the fatal shot he "was standing

right in the door, because he had a sight on everybody," and that he did not actually enter the apartment (R. 14). She further testified that the door to the apartment was closed when the "last two shots came through the door" (R. 11). She also stated that the deceased, when he was shot, was standing "next to the dresser and the oil stove, right in front of the door," that he had made no "move to leave where he was standing when he was shot," that he said nothing to petitioner just before he was shot, and that she saw nothing in his hand at the time (R. 11).

Miss McCullough was asked on cross-examination if it was not a fact that the deceased "had his hand in his pocket" when the shooting occurred; and she replied, "Yes, he had his hand in his pocket when he was standing up there by the dresser. * * * he was standing up there with his hand in his pocket and we were all laughing and talking" (R. 12–13). "That is the way he was standing," she explained, "when he was shot. He didn't have a chance to do anything. I don't guess he knowed what hit him" (R. 12).[2]

[2] A photograph of the body of the deceased, showing one hand in his pocket, was shown to this witness by defense counsel in connection with his cross-interrogation on this issue (R. 12) and also to other prosecution witnesses (R. 20, 23, 38). The photograph was subsequently introduced in evidence by the defense (R. 49–50) and was repeatedly referred to by defense counsel in his summation to the jury

Four other eyewitnesses to the shooting testified for the Government (R. 16–20, 21–22, 24–26, 27–30). Their testimony was in all material respects identical with that of Miss McCullough. They stated that there was no card game going on when the shooting occurred, and that, in fact, the game, whist, had ceased before petitioner left the premises following his exchange of words with the deceased concerning the latter's baby (R. 19, 21–22, 25–26, 28–29); that petitioner, after firing the fatal shot, fired four more times, including one shot directed at the feet of Esther Taylor, the deceased's wife, and two final shots from the hallway into the apartment through the door, which had meanwhile been slammed shut (R. 19, 22, 26, 30); and that petitioner, as he fired the fatal shot, uttered the remark, in substance, that he did not permit anybody to say he would kick his teeth out and get away with it (R. 19, 22, 26, 30). The only one of these other four witnesses who had any recollection as to the fact corroborated Miss McCullough's testimony that the deceased had one hand in his pocket when petitioner shot and killed him (R. 20; see R. 23, 31).

Sergeant Vogelson of the Metropolitan Police Department testified for the Government that he interviewed petitioner on the morning following

(R. 50–51, *passim*) as evidence corroborating petitioner's version of the shooting as an act of self defense (*infra*, pp. 8–9).

the homicide (R. 32–33). Petitioner told Vogelson that he and Hunter, the deceased, and two others were playing "blackjack" when the shooting occurred (R. 33). He, petitioner, according to his story to Vogelson, "was banking the game," and there was "eight dollars in the bank." Hunter, who was "playing a dollar," "hit a blackjack," but, "instead of claiming the dollar, that he was playing, from the bank, he claimed the entire eight dollars." When petitioner protested and sought to prevent Hunter from taking all the money in the "bank," Hunter told petitioner that "if he didn't like it, he would kick his teeth out," simultaneously rising to his feet and starting around the card table toward petitioner, "with his hand in his pocket." Petitioner thereupon shot Hunter. (R. 33–34.) Vogelson further testified that he asked petitioner whether Hunter "had any weapon in his hand at the time he fired this shot," and that petitioner replied, "no, he just had his hand in his pocket" (R. 34). Vogelson also testified that petitioner told him that he did not recall "firing more than one shot, * * * [as] he had been drinking" (R. 34). Petitioner also told Vogelson that, following the shooting, he "caught a cab and started to his brother's home in Alexandria, and on the way over, when they were crossing the 14th Street bridge, he threw the gun in the river" (R. 38, 34).

Vogelson further testified that in the course of his investigation of the homicide he examined the apartment where the fatal shooting occurred, and that "There were two bullet holes in the outside door. There were two bullet holes in the south wall of the room. There was one bullet hole in the floor, just inside the door." (R. 35). Photographs showing these bullet holes were received in evidence (R. 35–36). In response to a juror's question as to whether it could be determined from the bullet holes in the door whether "the bullets entered the door from the hall side of the door or from the room side of the door" (R. 36), Vogelson replied, "Apparently the bullets entered from the outside, because the outside hole was clean and the inside hole was ragged" (R. 37).

Petitioner testified at the trial in his own behalf and was the only defense witness (R. 39–43). On direct examination, he gave the same version of the shooting incident as he had previously given to Sergeant Vogelson on the day following the homicide (see pp. 6–7, *supra*), explaining that he shot the deceased when the latter "started around the table, with his hand in his pocket, and told me he would kick my teeth out of my head" (R. 39–40). Asked how he happened "to shoot two or three other times," he replied, "I don't know. I must have got nervous" (R. 40). He further testified that, after first fleeing to Virginia, he "decided not to run away,

and come back to my boss' house and told him about it, and he told me to go on up town, and I went back home, where he found the police waiting for him (R. 40).

On cross-examination, petitioner admitted that, as he was on his way to Virginia following the shooting, he threw the gun into the Potomac River from a taxicab, explaining that he "wanted to get rid of it" (R. 42). He was also asked whether he thought he "had a right to shoot this man if he was going to do something to you," to which he replied, "To defend myself, sure. He said he was going to kill me." His attention was then directed to the fact that he had said nothing on direct examination about a threat by the deceased to kill him, and he explained that "After he said he would kick my teeth out, he said he would kill me." (R. 42.)

The motion for a new trial on the ground of newly-discovered evidence, which gave rise to the instant proceeding, is not contained among the record papers, but the nature of the alleged new evidence relied on appears from two supporting affidavits executed by John M. Holzworth, an attorney retained by petitioner shortly before the filing of the motion (R. 67–68, 68–70). In the first of these affidavits, executed May 7, 1948, Holzworth stated that he had recently learned that "on the trial of the defendant the trial U. S. assistant Attorney Grace B. Stiles and Sergeant Vogelsang [*sic*] Washington Metropolitan police

officer in charge of the investigation of said murder, had in their possession evidence that the deceased Lee Hunter at the time of the killing had an open knife in his hand with which he was attacking or about to attack and assault the said Baxter Griffin," and that they "deliberately suppressed such vital evidence which would have substantiated the defendant's defense of self defense" (R. 67).

In the other affidavit, executed May 10, 1948, Holzworth stated that "in an interview with Charles Cornwell, a witness to the shooting and a witness on the trial of defendant, * * * said Cornwell stated that at the D. C. Morgue he saw a morgue employee turn over to Esther Taylor wife of Lee Hunter, deceased a purse and knife taken from the body of Hunter. That said employee said that the knife was open and in deceased [*sic*] hand when removed from his pocket. * * * That said Cornwell also stated that playing cards were scattered over the floor at the time of the shooting of Lee Hunter" (R. 68–69). The second affidavit also stated that officers Miller and Wyatt had told Holzworth that "playing cards were scattered over the floor" when they were at the scene shortly following the shooting (R. 69); that Joe Small, the morgue employee who removed the deceased's body, had told Holzworth that he "found the knife (black handled) in deceased's pocket" and that "playing cards were scattered over the floor of the room"

(R. 69); that Sergeant Vogelson had told Holzworth that "a knife was taken from Lee Hunter's body" (R. 69); that "the photografs [sic] taken by the police and in evidence on the trial do not show the scattered playing cards on the floor" (R. 69); and that "no mention was made [at the trial] of the knife on the deceased or in his hand or of the playng cards found scattered on the floor at time of the shooting" (R. 69). Such newly discovered evidence, the affidavit concluded, showed that evidence vital to the defendant's defense of self defense had been suppressed and that the government witnesses had perjured themselves (R. 70).

On May 21 and 25, 1948, a full hearing (R. 73–117) on the motion for a new trial was held before Judge Holtzoff, who had presided at the original trial (R. 3). The witnesses at the hearing were the six police officers (including those mentioned in Holzworth's affidavits) who were at the scene of the shooting within a short while after its occurrence (R. 81–83, 87–91, 92–95, 96–99, 100–101, 101–106, 106–108), the deputy coroner who examined the body at the scene (R. 91–92), Joseph Small, the morgue employee (R. 108–111), and Charles Cornwell, who was mentioned in Holzworth's second affidavit, and who was one of the eyewitnesses of the shooting (R. 111–112).

Small testified that when he arrived at the scene of the shooting the deceased's right hand was in

his pocket (R. 109), that he, Small, removed the hand from the pocket (R. 109), that the hand was grasping some playing cards at the time (R. 109), that some of these cards were dislodged from the deceased's hand when it was withdrawn and they fell on the floor (R. 110), that he saw no other cards scattered about anywhere—"Only what were scattered when his hand came out of his pocket, that was all" (R. 110); and that after removing the deceased's hand from his pocket, he put his own hand into the same pocket and found an open knife there (R. 109, 110).

Sergeant Vogelson corroborated the foregoing testimony, stating that "There were no cards on the floor until after the deceased's hand was removed from his pocket. At that time, some of the cards fell to the floor alongside his body" (R. 82). The bulk of the cards, however, "stayed in his hand" (R. 82). He described the knife that was found loose in the deceased's pocket as "a small black pen-knife that had originally been a two-bladed knife. One blade was broken off and that part of the blade was closed. The other blade was open" (R. 82).

The other police officers and the deputy coroner all corroborated the testimony of Small and Vogelson, the testimony as to whether or not cards were observed on the floor depending on the time the condition of the floor was noticed.

with relation to whether or not the deceased's hand had as yet been taken from his pocket (R. 91–92, 93, 94–95, 96–97, 100–101, 102–103, 106–108).

The witnesses' estimates as to the number of cards that were clasped in the deceased's hand when it was removed from his pocket varied from "just a few" (R. 92) to "a deck" (R. 82, 100). Small stated that there were "a good few cards" and possibly a deck (R. 110). Sergeant Embrey testified that "There did not appear to be 52 cards," but when asked if it was possible that there were "but five or six cards in his hand," he stated that "There were at least four times or five times that many" (R. 97).

Cornwell testified that he did not see any cards scattered on the floor at the time of the shooting, explaining that he had merely told Holzworth that he saw cards on the floor in some photographs of the scene taken after the shooting (R. 111–112).[1]

Petitioner himself did not testify at the hearing, nor was there any request that he be permitted to testify.

---

[1] Sergeant Voggelson testified that "The first picture was taken with the hand of the deceased in his pocket" and that "The second was taken after his hand was removed and was supposed to have shown the hand with the cards in it, but the photographer failed to catch that" (R. 90). The third photograph that was taken, however, which was a defense exhibit at the original trial, showed cards on the floor (R. 91).

Mrs. Stiles, the assistant United States Attorney who conducted the prosecution, made the following statement to the court (R. 84–85):

> I would like to state that the prosecution did know there was an open knife in the pocket of the deceased, but I took the position that there was no evidence in the case that this knife was ever taken [by the deceased] from his pocket. Even by the defendant's own testimony, he testified the deceased came around the table toward him with his hand in his pocket. The defense put in evidence the photograph which * * * showed this deceased with his hand in his pocket.
>
> I felt, just as Your Honor pointed out a while ago, if this fact of the knife had been raised it would not have been admissible. The man could have had a dozen knives in his pocket and unless it was shown that the defendant saw this knife or he was drawing out a knife or had a knife in his hand, that it would not have been admissible. That is the position I took. Certainly it was with no intention of suppressing any evidence which I felt was admissible.

The District Court denied the motion for a new trial (R. 71). In an oral opinion stating the reasons for the denial, the court (Judge Holtzoff) said (R. 115–116):

> The deceased was fatally shot by the Defendant. This is not denied. The Defendant contended, however, that he shot

in self-defense. Admittedly, there was a quarrel between the deceased and the Defendant. There is a dispute as to whether the quarrel was in the course of a card game or took place after a card game had been completed and concerned another subject.

The Defendant testified at the trial in his own behalf that the deceased made a menacing gesture, or what amounted to a menacing gesture, in the Defendant's direction. This gesture consisted of the deceased putting his right hand in his trousers pocket and coming in the direction of the Defendant.

It now appears that it is made on the basis for this application, that the deceased had an open pocket knife in his pocket at the time he made the menacing gesture. It does not appear, however, that he had withdrawn the knife from his pocket and it does not appear that the Defendant knew that the deceased carried an open pocket knife at the time. Moreover, the open pocket knife was not in the hands of the deceased, when the hand of the deceased was taken from his pocket. A number of playing cards was found in it and further search revealed the knife in his pocket, apparently lying loose.

The Court is unable to perceive that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case.

The question is whether the Defendant shot in self-defense. All that he knew was that deceased made to the Defendant what seemed to be a menacing gesture; namely, that the deceased put his hand in his right-hand trousers pocket. Moreover, it appears affirmatively that the deceased did not grab the knife but had a number of playing cards in his pocket. The knife was lying in his pocket, loose.

The question whether a person is justified in attacking an assailant in self-defense must be determined by the facts which were presented to the person who pleads self-defense. He did not know, it appears, that the deceased had an open knife in his pocket, and therefore its existence is irrelevant.

The second basis for the motion is additional testimony tending to show that a number of playing cards were strewn on the floor of the room in which the shooting took place. Now witnesses produced in support of this contention were the same witnesses who testified at the trial,[1] so there is nothing newly discovered in that respect. Moreover, that is a circumstance which does not appear to the Court to be of any substantial importance. The fact that a

[1] This is not strictly accurate. Three of the witnesses at the hearing on the motion for a new trial—Sergeant Vogelson, deputy coroner Rosenberg, and Cornwell—testified at the trial, but the other witnesses at the hearing (Small and the police officers other than Vogelson) were not witnesses at the trial. We perceive no relevance in the point, however.

card game had taken place is not disputed. Whether it was still in progress or whether it had ceased is not very important, so far as the Court views the issues of this case. Moreover, the fact that there were cards on the floor would not necessarily establish that the game was still in progress.

The Court realizes the importance of the issue presented to it but verdicts of juries must not be lightly set aside. The Court feels that it would be acting improvidently if it granted a new trial on the basis of the facts here presented. The Court felt that these contentions should be examined exhaustively and this has been done.

Petitioner appealed from the denial of the motion, and on June 16, 1948, on motion of the Government (R. 117–121), the appeal was dismissed by the Court of Appeals, without opinion, in a *per curiam* order (R. 134).[1]

SUMMARY OF ARGUMENT

The granting of a motion for a new trial on the ground of after-discovered evidence is a matter of discretion, not reviewable except for manifest abuse. The district judge was warranted in finding that the new evidence relied on was not relevant and that, in any event, it could not, by any reasonable possibility, result in a different verdict.

[1] See also the Court of Appeals' *per curiam* opinion of July 19, 1948, dismissing petitioner's appeal from an order denying a petition for a writ of habeas corpus. *Griffin* v. *Clemmer*, 169 F. 2d 961.

One of the items of new evidence relied on—the alleged fact that playing cards were strewn on the floor when the shooting took place—was not proved at the hearing on the motion. In fact, the contrary was demonstrated. It was shown that the deceased was clasping playing cards in his pocket when he was shot, but that fact was consistent with the government witnesses' testimony and did not tend to substantiate petitioner's testimony that he shot in self-defense.

The other item of new evidence offered—the fact that petitioner had an open knife in his pocket when he was shot—was irrelevant. It is clear that petitioner, even according to his own testimony, neither knew of nor suspected the presence of the knife in the deceased's pocket. Accordingly, its existence could not possibly have been relevant to petitioner's claim of self-defense. Moreover, the testimony at the hearing on the motion showed that the deceased was not holding the knife; it was lying loose in his pocket.

It is unreasonable to suppose that a jury at a new trial, if presented with the new evidence now relied on, might reach a different verdict. The established facts that petitioner wantonly fired additional shots after the fatal one and that he guiltily disposed of the gun by throwing it into a river rendered his testimony that he shot in self-defense all but incredible. Furthermore, in order for a jury to credit petitioner's testimony at a new trial, it would have to find

that all five of the Government's eyewitnesses to the homicide, who gave highly detailed and substantially identical versions of the shooting which were diametrically opposed to petitioner's solitary testimony of self-defense, perjured themselves with full realization that they were sending an innocent man to his death. The remoteness of such a possibility could properly be considered in ruling on the motion for a new trial in this case.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL

It is well settled that the granting or denial of a motion for a new trial on the ground of newly discovered evidence is a matter resting within the sound discretion of the trial court, and, in the absence of manifest abuse of such discretion, is not reviewable on appeal. *Helwig* v. *United States*, 162 F. 2d 837, 840 (C. A. 6); *Barber* v. *United States*, 142 F. 2d 805, 807 (C. A. 4), certiorari denied, 322 U. S. 741; *Long* v. *United States*, 139 F. 2d 652, 654 (C. A. 10); *Roberts* v. *United States*, 137 F. 2d 412, 416 (C. A. 4), certiorari denied, 320 U. S. 768; *Weiss* v. *United States*, 122 F. 2d 675, 691–692 (C. A. 5), certiorari denied, 314 U. S. 687; *Luke* v. *United States*, 84 F. 2d 711, 712 (C. A. 5), certiorari denied, 299 U. S. 542; *Joyce* v. *United States*, 294 Fed. 665, 668 (C. A. 9), certiorari denied, 264 U. S. 592; *Andrews* v. *United States*,

224 Fed. 418, 419 (C. A. 9); *Mitchell* v. *United States*, 196 Fed. 874, 878 (C. A. 9), certiorari denied, 226 U. S. 611. And in exercising its discretion, the trial court should be guided by the rule, among others, that the newly discovered evidence relied on must not only be material to the issues that were involved at the trial, but such that its consideration by a jury at a new trial would probably result in a different verdict. *Long* v. *United States*, *supra*, at 654; *Weiss* v. *United States*, *supra*, at 691; *Evans* v. *United States*, 122 F. 2d 461, 468–469 (C. A. 10), certiorari denied, 314 U. S. 698; *Wagner* v. *United States*, 118 F. 2d 801, 802 (C. A. 9), certiorari denied, 314 U. S. 622; *Prisament* v. *United States*, 96 F. 2d 865, 866 (C. A. 5); *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. A. 8).[6] The cases,

[6] The states also uniformly so hold: *O'Pryor* v. *State*, 237 Ala. 13 (1938); *Flowers* v. *State*, 27 Ariz. 70, 81 (1924); *People* v. *Shepherd*, 14 Cal. App. 2d 513, 518 (1936); *Miller* v. *People*, 92 Colo. 481, 489 (1933); *Smith* v. *State*, 117 Fla. 458, 462 (1934); *Aiken* v. *State*, 176 Ga. 338 (1933); *People* v. *Harrison*, 359 Ill. 295, 300 (1935); *Sullivan* v. *State*, 212 Ind. 79, 82 (1937); *State* v. *Pavey*, 193 Iowa 985, 992 (1922); *State* v. *Jella*, 132 Kans. 509, 513 (1931); *Jeffords* v. *Commonwealth*, 281 Ky. 568, 571 (1940); *State* v. *Bradley*, 166 La. 1010, 1013 (1928); *State* v. *Dodge*, 124 Me. 243, 250 (1925); *People* v. *Prag*, 261 Mich. 686, 688 (1933); *State* v. *Bergeson*, 203 Minn. 88, 89 (1938); *Carraway* v. *State*, 167 Miss. 390, 402 (1933); *State* v. *Jennings*, 326 Mo. 1085, 1093–1094 (1930); *State* v. *Gangner*, 73 Mont. 187, 190–191 (1925); *Mathews* v. *State*, 111 Neb. 593, 605 (1924); *State* v. *Long*, 90 N. H. 103, 108 (1939); *State* v. *Quintana*, 30 N. M. 348, 353–354 (1924); *People* v. *Priori*, 164 N. Y. 459, 472 (1900); *Bridge* v. *State*, 20 Ohio Cir. Ct. (N. S.) 231, 233, affirmed,

Federal and State (see note 6), make no distinction, in applying this rule, on the basis of the seriousness of the particular crime involved. However, where the offense in question is of a serious type, and particularly in a capital case, we believe that the rule as stated may place too heavy a burden on the defendant who moves for a new trial on the ground of newly discovered evidence, and that the proper rule should be that the newly discovered evidence relied on must be such that there is a *reasonable possibility* that its consideration by a jury at a new trial would result in the return of a different verdict. In any event, we shall assume for purposes of this case the standard that is more favorable to the defendant.

We submit that the District Court's denial of the motion for a new trial in this case was a proper exercise of discretion.

The newly discovered evidence relied on consisted of (1) the alleged fact that playing cards were scattered about on the floor of the room when the fatal shooting occurred, and (2) the

87 Ohio St. 464 (1912); *McKissack* v. *State*, 61 Okla. Cr. 65, 71 (1937); *State* v. *Evans*, 98 Ore. 214, 223–224 (1920); *Commonwealth* v. *Russoniello*, 263 Pa. 93, 108 (1919); *State* v. *Jones*, 185 S. C. 274, 276 (1936); *State* v. *Loper*, 26 S. D. 151, 158 (1910); *Denran* v. *State*, 134 Tex. Cr. 433, 437–438 (1938); *State* v. *Hawkins*, 81 Utah 16, 30 (1932); *State* v. *Reynolds*, 96 Vt. 37 (1922); *Holbrook* v. *Commonwealth*, 165 Va. 700, 704 (1935); *State* v. *Adams*, 181 Wash. 222, 229–230 (1935); *State* v. *Beckner*, 118 W. Va. 430, 435–436 (1937).

fact that an open knife was found in the deceased's pocket when his body was examined. It was contended that if this evidence had been brought to the attention of the jury, it would have tended to substantiate petitioner's version of the shooting as an act of self-defense against a threatened assault resulting from a dispute over money in a card game, as against the diametrically different testimony of all five of the Government's eyewitnesses to the homicide that the shooting was an act of malice against the deceased for having used insulting language to petitioner in a quarrel which had nothing to do with a card game.

1. With respect, however, to the allegation that playing cards were scattered on the floor at or immediately following the time of the fatal shooting, it was overwhelmingly and without contradiction established at the hearing on the motion that such simply was not the fact. The only cards observed by anyone on the floor were a few which were dislodged from the deceased's hand, long after the shooting occurred, when his hand, clasped tightly about some cards, was removed from his pocket by the morgue employee. And the fact that the deceased had cards in his hand and his hand in his pocket when he was shot plainly did not tend to contradict the unanimous testimony of the Government's eyewitnesses at the trial concerning the circumstances surrounding the shooting. The Government's witnesses all agreed that a card game, whist, had been in progress some

time before the quarrel between petitioner and the deceased, which led to the shooting. Those who had taken any notice of the fact, moreover, testified that the deceased had his hand in his pocket when the fatal shot was fired. The fact that the deceased had picked up some of the cards used in the whist game and was holding them in his pocket when petitioner returned to the apartment and opened fire on him, therefore, was entirely consistent with the Government's witnesses' testimony. Nor did the fact that the deceased was holding cards in his pocket when he was shot tend to substantiate petitioner's solitary testimony that he shot in self-defense. For it is manifestly unlikely that a man who reaches into his pocket to draw a weapon would encumber his effort by retaining playing cards or anything else in his hand in the process.[7]

[7] Counsel for petitioner suggest the possibility that "Maybe the knife *was* in deceased's hand at the time he was shot, but *after* the shot he convulsively released the knife and grabbed the cards" and adds that "Certainly had the presence of the knife been made known to appellant's counsel at the time of trial such an argument would not have been too far fetched to make to a jury. And what judge can say that such an argument might not have created a reasonable doubt in the mind of at least one juror, or what judge can say that the jury might not have returned a verdict of second-degree murder or perhaps manslaughter" (Br. 8). We suppose that no argument is too far-fetched for an attorney representing a man accused of murder to make to the jury, but submit that counsel's present speculations miss the point involved in the issue before this Court. That issue is whether the district judge *abused his discretion* in denying the motion for a new trial. The fact that petitioner's present counsel

2. It is true that it was established at the hearing that the deceased, when he was shot, had an open pen-knife in the same pocket as that in which he was holding the playing cards. But the District Court was justified in considering that fact irrelevant to the question of whether petitioner's or the prosecution witnesses' testimony at the trial was the truth. In the first place, as the court pointed out, the deceased did not have his hand on the knife when the fatal shot was fired; on the contrary, it was lying loose in his pocket. And in the second place, as the court further observed, there was no evidence that petitioner knew the deceased had a knife in his pocket or even suspected the fact. Certainly, if he knew or believed that the deceased was thus armed, he would have so stated at the trial in aid of his testimony that he shot in self-defense. As we have noted, moreover, it was not until his cross examination that petitioner testified that the deceased threatened to kill him, his testimony on direct examination having been merely that the deceased threatened to "kick my teeth out." The significance of this discrepancy becomes clearer when it is recalled that petitioner, in telling his story to Sergeant Vogelson

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or even a member of this Court might have ruled on the motion differently from the district judge is beside the point. We submit that the district judge's ruling—in effect, a determination that there was no reasonable possibility that the new evidence might produce a different verdict—was a reasonable exercise of discretion.

on the morning following the shooting, claimed merely that the deceased's threat was to kick his teeth out, and said not a word about a threat to kill him. In fact, as Voggelson testified, petitioner was specifically asked at that time whether the deceased had any weapon in his hand when he made the threat, and petitioner replied, "no, he just had his hand in his pocket." The conclusion is inescapable, therefore, that petitioner did not know, and never claimed to believe or suspect, that the deceased had a knife in his pocket at the time of the shooting. Its presence there was, as the District Court observed, an irrelevant fortuity so far as any issue at the trial was concerned, even if petitioner's version of the circumstances of the shooting was given credence by the jury, which it manifestly was not.

Furthermore, it is impossible to conclude that the new evidence relied on by petitioner might, by any reasonable possibility, result in a different verdict at a new trial. For it was established at the trial—and not denied by petitioner—that, after killing the deceased, petitioner recklessly and wantonly fired four additional shots, including one shot directed at the feet of the deceased's wife, and two parting shots into the apartment through a closed door. Petitioner, moreover, after the shooting admittedly disposed of the gun by throwing it into the Potomac River. This wanton additional shooting and the disposal of the gun in the manner stated were

obviously not the acts of an innocent man killing in self-defense, and these two facts rendered petitioner's testimony that he shot the deceased to save himself all but incredible. The absence of any reasonable possibility that a new trial would result in a different verdict is further emphasized by the fact that the jury at a new trial, in order to give credence to petitioner's version of the circumstances attending the shooting, would have to reject as perjurious the testimony of all five of the prosecution's eyewitnesses to the homicide. It must be remembered that this was not a case in which the testimony of the Government's witnesses agreed in most respects with that adduced by the defense, differing only in the interpretation of the homicide as necessary or unnecessary as an act of self-defense. The Government's witnesses gave a highly detailed and substantially identical account of the circumstances surrounding the homicide. Their version, utterly at variance with that of petitioner, showed the killing to have been a deliberately malicious act. Petitioner's version was, moreover, uncorroborated by anybody, notwithstanding the fact that the shooting was witnessed by numerous eyewitnesses, and obviously was prompted by self-interest. To reach the conclusion that a jury at a new trial might conceivably credit petitioner's story and reject that of the disinterested eyewitnesses, it would be necessary to assume that the jury might possibly

find that all five of those eyewitnesses deliberately perjured themselves, fully realizing that by so doing they were sending an innocent man to his death. Such a possibility is too remote to warrant the granting of a new trial on the basis of it.

For the reasons stated, we submit that the district judge's refusal to grant a new trial on the basis of the new evidence offered was a reasonable exercise of discretion, and should be upheld.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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